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IN THE

Supreme Court of the United States

ZACHARY HRASKY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether law enforcement officers' exploratory search of the interior of Petitioner's vehicle, after arresting him beyond "reaching distance" from the vehicle, violated the Fourth Amendment's search-incident-to-arrest doctrine.

2. Whether this Court—consistent with the suggestions of several of its Justices—should reconsider its holding in *New York v. Belton*, 453 U.S. 454 (1981), at least to the extent it entitles officers to conduct exploratory searches of vehicles' interiors incident to arrests for nothing more than traffic violations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Zachary Hrasky respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in *United States v. Hrasky*, No. 05-2111.

OPINIONS BELOW

The opinion of the United States Court of Appeals of the Eighth Circuit (App. 1a-16a) is reported at 453 F.3d 1099. The district court's memorandum and order adopting the magistrate judge's report and recommendation (App. 17a-18a) is unpublished, and the report and recommendation itself (App. 19a-34a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2006. The court denied Petitioner's timely petition for rehearing and rehearing en banc on September 13, 2006. App. 35a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

This case, in which the Eighth Circuit upheld a warrantless exploratory search of an automobile following the driver's arrest for a traffic violation, raises an issue concerning this

Court's search-incident-to-arrest doctrine that has divided federal and state courts. This case further presents the Court with an opportunity to reconsider its decision in *New York v. Belton*, 453 U.S. 454 (1981), and to revise the vehicular search-incident-to-arrest doctrine itself in order to bring it in line with both current police practices and traditional Fourth Amendment jurisprudence.

1. On July 2, 2004, Investigator Cody Enlow of the Scottsbluff (Nebraska) Police Department advised the State Patrol that the Department had received an anonymous tip that Petitioner Zachary Hrasky might be involved in methamphetamine possession or distribution. App. 19a-20a. Investigator Enlow also told the State Patrol (apparently based on a computerized search) that Petitioner's driver's license was suspended. App. 20a; Dist. Ct. Ex. 1 (videotape) at 15:46. Later that day, at 3:45 p.m., Nebraska State Patrol Trooper Jeff Wallace observed Petitioner driving a pickup truck near Scottsbluff and pulled him over. Video and audio equipment installed on the dashboard of Trooper Wallace's patrol car recorded the stop and subsequent events.

Trooper Wallace asked Petitioner to exit his vehicle and led him to the patrol car. In response to Trooper Wallace's inquiries, Petitioner admitted that his driver's license had been suspended, App. 2a, but he told Trooper Wallace that he had a letter entitling him to reinstatement. Wallace explained that merely having such a letter does not actually reinstate driving privileges. Ex. 1 at 15:49. He then handcuffed Petitioner and placed him securely in the back seat of the patrol car. App. 2a, 21a.

At 3:54 p.m., Trooper Wallace suggested to Petitioner that he was going to arrest him for driving with a suspended license. App. 2a; Ex. 1 at 15:54. Petitioner said he did not want to go to jail and requested to speak with a narcotics officer about becoming a confidential informant regarding local drug activity. *Id.* Accordingly, Trooper Wallace

contacted Investigator Enlow, who arrived on the scene at 4:20 p.m. Investigator Enlow joined Petitioner in the rear of Wallace's patrol car and talked with him for some forty-five minutes. App. 21a. Investigator Enlow repeatedly asked Petitioner for permission to search his car, but Petitioner consistently refused. *Id.* Investigator Enlow also weighed whether to utilize Petitioner as a confidential informant. App. 2a, 21a. Had they reached an agreement, Trooper Wallace might have decided to release Petitioner with a citation. *Id.* Investigator Enlow ultimately decided, however, that Petitioner was either "unable or unwilling" to perform as a confidential informant. App. 6a; *see also* App. 2a, 21a. At about 5:00 p.m., therefore, Investigator Enlow advised Wallace to proceed with officially arresting Petitioner for driving with a suspended license. App. 2a, 21a-22a.

A few minutes later—with Petitioner still handcuffed in the back seat of Trooper Wallace's locked patrol car—Investigator Enlow, Trooper Wallace, and a third officer who had come to the scene, Sergeant Stransky, undertook a search of Petitioner's truck. App. 3a, 22a. They searched the interior of the truck's extended cab area for more than forty minutes, apparently dismantling significant portions of the passenger compartment. App. 24a-25a; Ex. 1 at 17:04-17:54. The officers never found any evidence of illegal drugs. During this time, however, Investigator Enlow disassembled a factory-installed plastic insert on the side panel of the passenger side of the back seat, revealing a container in the fender area that housed the vehicle's suspension. App. 3a, 22a. Investigator Enlow looked inside the container and found two handguns. *Id.*

2. The federal government charged Petitioner in the U.S. District Court for the District of Nebraska with being a felon in unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(1). App. 1a. During pretrial proceedings, Petitioner moved to suppress the evidence of the handguns, arguing that

the officers' warrantless exploratory search of his truck violated the Fourth Amendment. App. 19a.

In addition to making clear that the search could not be sustained as an "inventory search" or under the "automobile exception" to the warrant requirement,[1] the magistrate rejected the government's argument that the search was a valid search incident to arrest. The search-incident-to-arrest doctrine provides that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment," including any "containers" therein. *New York v. Belton*, 453 U.S. 454, 460 (1981). The magistrate reasoned, however, that "[t]he justification for a rule allowing contemporaneous searches incident to a valid arrest—for example, to seize weapons or prevent the destruction of evidence of a crime—'are absent where a search is remote in time or place from the arrest.'" App. 28a-29a (quoting *Chimel v. California*, 395 U.S. 752, 764 (1969) (internal quotation omitted)). While Eighth Circuit precedent indicated that the search of Petitioner's vehicle was not "'remote in place'" from the arrest, the magistrate concluded that the search was so "remote in time" from the officers' initial contact with Petitioner that it could not be considered "a contemporaneous incident of the arrest." App. 29a, 32a.

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[1] Officers may conduct "inventory searches" pursuant to "standard police procedures" for the purpose of "protecting [a] car and its contents." *South Dakota v. Opperman*, 428 U.S. 364, 371-73 (1976). But "dismantling a portion of the passenger compartment does not qualify as standard police procedure, and does not serve the purpose of protecting the car and its contents under any normal construction of those terms, at least on the evidence in this record." App. 24a (internal quotations omitted). The "automobile exception" permits officers to search a vehicle when they have probable cause to believe that it contains contraband. *See, e.g., Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999) (per curiam). But the circumstances here fell "far short of [that] standard." App. 32a.

The government objected to the magistrate's report and recommendation, prompting the district court to conduct "a de novo review of the record." App. 17a. Finding that the magistrate "fully, carefully, and correctly found the facts and applied the law," the district court issued an order adopting the magistrate's report and recommendation, and granting Petitioner's motion to suppress. App. 17a-18a.

3. The government took an interlocutory appeal to the Eighth Circuit, raising the sole argument that the officers' search of Petitioner's vehicle was a lawful search incident to arrest. A divided panel of the court of appeals agreed and reversed the district court. App. 9a. Citing Eighth Circuit precedent, the majority explained that a search is not remote in place even when the arrestee "has exited the vehicle and has been handcuffed and placed in a police officer's patrol car." App. 5a (citing *United States v. Barnes*, 374 F.3d 601, 603 (8th Cir. 2004), *cert. denied*, 434 U.S. 1079 (2005)). The majority did not deem the search here remote in time either. The majority reasoned that because *Knowles v. Iowa*, 525 U.S. 113 (1998), prohibits officers from conducting searches incident to mere citations for traffic violations, the officers did not arrest Petitioner "in the sense that underlies the doctrine of searches incident to arrest" until they decided not to let him go with a citation. App. 6a-7a. Although more than one hour passed between the officers' stopping Petitioner and effectuating the custodial arrest, the majority excused this lapse of time as part of a "continuous series of events" that did not defeat the "contemporaneous" nature of the eventual search. App. 5a-7a. Finally, the majority acknowledged that in *Thornton v. United States*, 541 U.S. 615 (2004), several members of this Court expressed "interest in rethinking the doctrine" in this area, but it asserted that it was unable in this case to stray from the "binding authorities" in the Eighth Circuit. App. 5a.

Judge Gibson dissented. He noted Petitioner, "held in the back seat of a patrol car, would have been hard-pressed to

reach either evidence or weaponry stowed in the passenger compartment of his truck." App. 12a. But he agreed with the majority that Eighth Circuit precedent holding that "'[t]he lawfulness of the search does not depend on whether the occupant was actually capable of reaching the area during the course of the police encounter'" rendered this fact irrelevant. *Id.* (quoting *Barnes*, 374 F.3d at 604). Still, Judge Gibson disagreed with the majority's decision to adopt an "amorphous new rule" allowing vehicular searches long after officers have restrained motorists so long as a "continuous sequence of events" connects the initial stops to subsequent custodial arrests. App. 14a-16a. Judge Gibson asserted that this rule "makes an 'impressionistic blur' of *Belton*'s bright-line rule, . . . thereby placing police officers in the situation of making precisely the sort of *ad hoc* determinations *Belton*'s bright-line rule sought to avoid." App. 15a (internal citations omitted).

Finally, Judge Gibson expressed misgivings about *Belton* itself. He observed that to the extent that *Belton* can be extended to cover this result, the majority opinion "comes dangerously close to transform[ing] the search incident to arrest exception into a search *following* arrest exception." App. 16a (internal quotation and citation omitted; emphasis in original). To that end, Judge Gibson joined the several Justices on this Court and judges in lower courts in suggesting that this Court reexamine *Belton*. App. 15a n.5.

4. The Eighth Circuit denied Hrasky's petition for rehearing and rehearing en banc. App. 35a. Three judges noted that they would have granted the petition. *Id.*

REASONS FOR GRANTING THE WRIT

1. This Court held in *New York v. Belton*, 453 U.S. 454 (1981), that when police officers arrest an occupant of a vehicle, they may search the interior of the vehicle incident to the arrest, and in *Thornton v. United States*, 541 U.S. 615

(2004), this Court made clear that this rule also applies when officers arrest someone next to a vehicle. But federal courts of appeals and state courts of last resort are deeply and intractably divided over a question that *Thornton* expressly reserved: whether the Fourth Amendment automatically entitles officers who arrest someone who is not even within "reaching distance" of his vehicle at that time to search the vehicle. *Thornton*, 541 U.S. at 622 n.2. This Court should review the Eighth Circuit's holding here that no such spatial limitation exists because that holding does precisely what this Court explicitly refused to do in *Belton*: It severs the search-incident-to-arrest doctrine from its conceptual foundations, which depend on at least the theoretical possibility that the arrestee could grab something inside the vehicle.

2. The swelling confusion over whether the *Belton* rule applies when officers arrest people beyond reaching distance from vehicles is emblematic of the need to reexamine the rule in a more fundamental manner. The rule is purportedly based on protecting officer safety and preserving evidence. In practice, however, the rule is not connected to either goal. The rule also is prone to abuse, and it fails to provide predictable guidance to officers or motorists. Accordingly, this Court should take this opportunity—consistent with the recent suggestions of several of its Justices—to reconsider *Belton* and at least to preclude officers from searching vehicles incident to arrests for nothing more than traffic offenses. Such a holding would root this area of jurisprudence in actual police practices, while at the same time grounding it in traditional Fourth Amendment principles and providing a truly workable and easily understood rule for officers, individuals, and courts alike.

I. This Court Should Resolve Whether Arresting Petitioner Beyond "Reaching Distance" from His Vehicle Automatically Entitled Police Officers to Conduct a Full Exploratory Search of the Interior of the Vehicle.

A. Federal Courts of Appeals and State Courts of Last Resort Are Divided over How *Belton* Applies in Cases Such as this One.

1. Under this Court's modern search-incident-to-arrest jurisprudence, police officers may conduct warrantless searches incident to arrests for two reasons: (1) "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and (2) "to prevent [the] concealment or destruction" of evidence. *Chimel v. California*, 395 U.S. 752, 762-63 (1969). Thus, in *Chimel*, this Court held that when officers arrest someone in his home, they may search the arrestee's person and "the area into which an arrestee might reach in order to grab a weapon or evidentiary items." *Id.* at 763. But the officers' authority does not extend beyond that immediate area, for there is no reason to believe that a person can reach into "any room other than that in which an arrest occurs." *Id.*

This Court applied this framework to vehicular searches in *Belton*. Perceiving the need for "a straightforward rule, easily applied, and predictably enforced," this Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident to that arrest, search the passenger compartment"—that is, the vehicle's interior—including any "containers" therein. *Belton*, 453 U.S. at 459-60. This Court emphasized that this holding "in no way alter[ed] the fundamental principles established in the *Chimel* case" but rather simply "determine[d] the meaning of *Chimel*'s principles in this particular and problematic context." *Id.* at 460 n.3.

Most recently, this Court clarified in *Thornton* that "the arrest of a suspect who is *next to* a vehicle presents identical concerns regarding officer safety and destruction of evidence as the arrest of one who is inside the vehicle." 541 U.S. at 621 (emphasis added). Accordingly, this Court held that when officers arrest a "recent occupant" of a vehicle, they may search the interior of the vehicle even if the arrestee was outside his car when approached and arrested. *Id.* at 623-24. This Court noted that "an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search." *Id.* at 622. But because the defendant in *Thornton* conceded that he had been in "close proximity" to (or, as this Court put it, "next to") his vehicle when arrested, this Court expressly reserved the question of whether a person must be at least within "reaching distance" of the car at the time of arrest in order to be a "recent occupant" for purposes of the *Belton* rule. *Id.* at 622 n.2; *see also id.* at 621. This case raises that unresolved question.

2. There is a deep division among the federal and state courts as to whether the Fourth Amendment permits officers to search an arrestee's vehicle when he is arrested beyond reaching distance from it. The Seventh Circuit recently identified three federal courts of appeals on each side of this issue. *United States v. Pittman*, 411 F.3d 813, 815-16 (7th Cir. 2005). Canvassing state courts of last resort brings the conflict to five-to-four, and the conflict runs still deeper when other lower court decisions are considered.

In this case, the Eighth Circuit, building on its statement that "[t]he lawfulness of the search does not depend on whether the occupant was *actually capable* of reaching the area [within the vehicle] during the course of the police encounter," *United States v. Barnes*, 374 F.3d 601, 604 (8th Cir. 2004), *cert. denied*, 543 U.S. 1079 (2005), held that the Fourth Amendment permitted officers to search Petitioner's car even though he was in a patrol car when he was arrested for purposes of the search-

incident-to-arrest doctrine. App. 6a-7a; *see also United States v. Riedesel*, 987 F.2d 1383, 1388-89 (8th Cir. 1993) (upholding search when defendant was arrested at a gas station and apparently beyond reaching distance from his car).

This holding is consistent with decisions from the Seventh Circuit, as well as the Supreme Courts of Kentucky and Indiana. *See United States v. Arango*, 879 F.2d 1501 (7th Cir. 1989) (suspect was one block away from his car when arrested); *Rainey v. Commonwealth*, 197 S.W.3d 89 (Ky. 2006) (arrestee was fifty feet from his vehicle), *petition for cert. filed*, No. 06-720 (U.S. Nov. 21, 2006); *Penman v. Commonwealth*, 194 S.W.3d 237, 250-51 (Ky. 2006) (one block away); *Black v. State*, 810 N.E.2d 713 (Ind. 2004) (suspect had exited his vehicle, entered an auto shop, and requested an oil change before police arrived on the scene and arrested him). It also comports with one recent district court decision. *United States v. Moore*, 2006 WL 560640, at *5 (M.D. Fla. Mar. 7, 2006) ("approximately 90 feet" away at the time of arrest). The general reasoning of these courts is that a person may be a "recent occupant" "based solely on his temporal relationship to the vehicle." *Rainey*, 197 S.W.3d at 94. So long as an arrestee was inside a vehicle shortly before he was arrested—or can be traced back to being inside the vehicle by a "continuing series of events," App. 7a—officers may search the vehicle incident to the arrest, regardless of whether the arrestee was so far away from the car at the time of arrest that it would have been impossible for him to reach anything inside it.

By contrast, the Sixth, Tenth, and District of Columbia Circuits, as well as the Minnesota and Arizona Supreme Courts, all have held that the Fourth Amendment prohibits officers from searching an arrestee's vehicle if they arrested him beyond reaching distance from it. *See United States v. Edwards*, 242 F.3d 928, 938 (10th Cir. 2001) (suspect arrested 100-150 feet from vehicle); *United States v. Strahan*, 984 F.2d 155 (6th Cir. 1993) (roughly thirty feet from vehicle); *United*

States v. Fafowora, 865 F.2d 360, 361 (D.C. Cir. 1989) ("approximately one car length away, at the time of their arrest")[2]; *State v. Dean*, 76 P.3d 429 (Ariz. 2003) (defendant hiding in attic after driving to his residence)[3]; *State v. Robb*, 605 N.W.2d 96 (Minn. 2000) (first approached by officers on the shore of a lake while his car was in an adjacent parking lot). One intermediate state court has reached the same conclusion. *See State v. Rathbun*, 101 P.3d 119 (Wash. Ct. App. 2004) (forty to sixty feet). The reasoning of these courts is simple: when a person is not within "grab space" of his car when arrested there is "no reason to fear that [he] could retrieve a weapon or destroy evidence in the car." *Edwards*, 242 F.3d at 938. "To apply *Belton* in such a circumstance would sever *Belton* from its foundation in *Chimel*: that at the time the

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[2] The U.S. District Court for the District of Columbia recently issued an opinion consistent with this District of Columbia Circuit precedent. In a case in which police arrested a defendant one block away from his car, the district court held: "It would stretch even the outermost boundaries of ordinary reason and logic for this Court to hold that, under such circumstances, the Lexus was within defendant's immediate control. Where, as here, the vehicle is not even theoretically within the immediate control of the arrestee, a search may not be justified under *Thornton* as incident to arrest." *United States v. Dubose*, 2006 WL 1030154, at *9 (D.D.C. Apr. 19, 2006), *on reconsideration in part*, 2006 WL 1876999 (July 05, 2006).

[3] The Arizona Supreme Court held the search invalid not only in light of the "physical distance of the arrestee from the vehicle at the time of arrest" but also because two and one-half hours had passed between his exit from his vehicle and his arrest. *Dean*, 76 P.3d at 437. Yet it is clear that this additional fact would not have swayed the Eighth Circuit to find the search unreasonable. The Eighth Circuit excuses any time lapse that is part of a "continuous sequence of events," App. 6a, and the police in *Dean* continually pursued the suspect after seeing him driving on the street. A subsequent decision from the Arizona Court of Appeals holds a search invalid solely on spatial distance grounds. *State v. Gant*, 143 P.3d 379 (Ariz. Ct. App. 2006) (defendant arrested eight to ten feet from car).

person was arrested, the area to be searched was under his or her immediate control." *Robb*, 605 N.W.2d at 101.

B. The Eighth Circuit's Decision Contravenes this Court's Precedent.

It is hornbook Fourth Amendment law that warrantless searches must be "strictly tied to and justified by the circumstances which rendered [their] initiation permissible." *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (internal quotation and citation omitted); *see also Trupiano v. United States*, 334 U.S. 699, 708 (1948) ("A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest."). That is why this Court in *Belton* was careful to note that allowing police officers to search vehicles that arrestees occupied "in no way alter[ed] the fundamental principles established in the *Chimel* case"—that is, the principles that searches incident to arrest are permissible only insofar as necessary to protect officer safety or to prevent the destruction or concealment of evidence. 453 U.S. at 460 n.3; *see also id.* at 460 ("[T]he *Chimel* case established that a search incident to arrest may not stray beyond the area within the immediate control of the arrestee . . . .").

The Eighth Circuit's holding here is wholly unmoored from these twin justifications. As the Eighth Circuit's opinion makes clear, Petitioner was not arrested "in the sense that underlies the doctrine of searches incident to arrest" until he was already restrained in the back seat of an officer's patrol car. App. 7a. It would have been impossible at that time for Petitioner to exit the police car, let alone to reach anything in his pickup truck. Consequently, allowing police officers to search an arrestee's vehicle under these circumstances—or in any other circumstance in which an arrestee is beyond reaching distance from his vehicle when arrested—does precisely what this Court explicitly refused to do in *Belton*: It unlatches the

search-incident-to-arrest doctrine from its conceptual foundations. *See Chimel*, 395 U.S. at 764 (safety and evidence-gathering justifications "are absent where a search is remote in time or place from the arrest") (quotation and citation omitted). As Professor LaFave—a leading Fourth Amendment expert to whom this Court referred in *Belton* itself, *see* 453 U.S. at 458—has observed, "it certainly seems that the 'recent occupant' category must be limited to situations in which the arrest is made quite near the car promptly after the person thereafter arrested left it, for otherwise the *Belton* bright-line rule would produce results which are totally absurd." 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 7.1(c), at 530-31 (4th ed. 2004).

This conclusion does no violence to *Belton*'s and *Thornton*'s insistence on "[t]he need for a clear rule" in this area, "readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment." *Thornton*, 541 U.S. at 622-23. *Belton* and *Thornton* establish a bright-line rule in the sense that, *so long as a suspect qualifies in spatial and temporal terms as a "recent occupant" of a vehicle*, officers need not determine exactly which parts of the vehicle's interior are within an arrestee's immediate grasp. *See id.* at 622 (refusing to assess whether suspect who was arrested beside his car "could have reached under the driver's seat"); *Belton*, 453 U.S. at 460-61 (refusing to require officers to assess which "articles inside the relatively narrow compass of the passenger compartment" are actually within an occupant's reach). But neither *Belton* nor *Thornton* establishes any clear rule delineating exactly which arrestees are "recent occupants." To the extent a clear rule is desirable, enforcing a clear boundary at reaching distance from a vehicle is far more workable than the amorphous "continuous sequence of events" test the Eighth Circuit adopted here or any of the other multi-pronged analyses courts have adopted in light of *Thornton* to weigh arrestees' spatial proximity to their vehicles against

other factors. *See, e.g.*, *Rainey*, 197 S.W.3d at 94 ("[W]hile temporal and spatial proximity to the automobile are certainly factors to be considered in determining the arrestee's status as a 'recent occupant' . . . they are not necessarily dispositive."); *see also infra* at 20-22 (other courts).

II. This Court Should Reconsider *Belton* at Least to the Extent that It Allows Exploratory Searches of Vehicles Incident to Arrests for Nothing More than Traffic Violations.

The split of authority concerning the "recent occupant" rule is endemic of a need to reexamine the *Belton* doctrine in a more fundamental manner. When this Court last confronted this doctrine in the *Thornton* case, five Justices expressed serious discontent with the doctrine. Justice Scalia, writing for himself and Justice Ginsburg, asserted that *Belton*'s assumption that arrestees (such as Petitioner here) who are in handcuffs while their vehicles are being searched might plausibly grab something from their vehicles "stretches [the doctrine] beyond its breaking point." *Thornton*, 541 U.S. at 625 (Scalia, J., joined by Ginsburg, J., concurring in the judgment). Justice O'Connor likewise "express[ed] [her] dissatisfaction with the state of the law in this area," which she described as "a direct consequence of *Belton*'s shaky foundation." *Id.* at 624 (O'Connor, J., concurring in part). And Justice Stevens, joined by Justice Souter, bemoaned the lack of any "limiting principle" in the *Belton* doctrine that prevents officers from undertaking exploratory searches that lack any justification under *Chimel*'s safety or evidence-preservation rationales. *Id.* at 636 (Stevens, J., dissenting).[4] The plurality did not rebut

[4] These opinions were not the first time that Justices on this Court had registered displeasure with the *Belton* doctrine. The *Belton* opinion itself garnered only five votes, with four Justices rejecting its reasoning. *See Belton*, 453 U.S. at 469 (Brennan, J., joined by Marshall, J., dissenting) (Court's opinion "create[s] far more problems than it solves"); *id.* at 472 (White, J., joined by Marshall, J., dissenting) (considering *Belton* "an

these criticisms, but rather declined to address them at that time because the petitioner had not argued that *Belton* should be recast or overruled. *Id.* at 624 n.4 (plurality opinion).

Following *Thornton*, federal and state court judges across the country—like the dissenting judge here, App. 15 n.5 (Gibson, J., dissenting)—have echoed the calls for this Court to reconsider the current search-incident-to-arrest doctrine. *See, e.g.*, *United States v. Weaver*, 433 F.3d 1104, 1107 (9th Cir.) ("We respectfully suggest that the Supreme Court may wish to re-examine this issue."), *cert. denied*, 126 S. Ct. 2053 (2006); *United States v. Osife*, 398 F.3d 1143, 1147 (9th Cir.) ("[I]t seems to us that Justice Scalia's view is more analytically sound than the prevailing approach, which relies on the legal fiction that a suspect handcuffed and locked in a patrol car might escape and grab a weapon from the passenger compartment of his own car."), *cert. denied*, 126 S. Ct. 147 (2005); *Barnes*, 374 F.3d at 605 (Smith, J., dissenting) ("I share the concern expressed by Justices O'Connor and Scalia in *Thornton* that some may view a search incident to an arrest as 'a police entitlement.'"); *Rainey*, 197 S.W.3d at 95 (Cooper, J., concurring) ("In my view (and that of five members of the Court that decided *Thornton*), the reasoning supporting" the search-incident-to-arrest doctrine "with respect to automobile searches is seriously flawed."). Leading commentators likewise have agreed that Justice Scalia's critique of *Belton*'s rationale is "so compelling that it is hard to see how a majority of the Court, in a future case squarely presenting that issue, could conclude otherwise." 3 LaFave, *supra*, at 531; *see also* Leslie A. Lunney, *The (Inevitably Arbitrary) Placement of Bright Lines:* Belton *and Its Progeny*, 79 Tul. L. Rev. 365, 394-400 (2004).

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extreme extension of *Chimel* and one to which I cannot subscribe"); *Robbins v. California*, 453 U.S. 420, 447 (1981) (Stevens, J., dissenting) ("disagree[ing]" in *Belton*'s companion case with the *Belton* opinion), *overruled by United States v. Ross*, 456 U.S. 798 (1982).

This Court should take this opportunity to reconsider the *Belton* doctrine and to limit at least the particularly untenable custom of officers' undertaking purely exploratory searches of vehicles in connection with arrests for nothing more than traffic violations. Experience, empirical research, and legal reflection now show beyond dispute that *Belton*, especially in cases such as this, is unsound in theory and unworkable in practice. And traditional Fourth Amendment law provides ready alternative frameworks that would properly protect individual privacy while still allowing police officers to protect themselves and to perform legitimate law enforcement functions at the time of arrests.

A. The *Belton* Doctrine Is Unsound in Theory and Unworkable in Practice.

The current search-incident-to-arrest doctrine, as exemplified in cases such as this one, suffers from three fatal flaws: (1) it generates incongruous results; (2) it is prone to abuse; and (3) it fails to provide clear guidance to police officers or anyone else.

1. The *Belton* rule is divorced from empirical reality and, therefore, leads to incongruous results. The *Belton* rule is based on the assumption that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" 453 U.S. at 460 (quoting *Chimel*, 395 U.S. at 763). But that is simply not so. As the United States conceded in *Thornton*, it is standard police procedure for officers who arrest a motorist to "restrain[]"—that is, to handcuff—"an arrestee on the scene before searching a car that he just occupied." *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in the judgment) (quoting Br. for United States 36-37). Indeed, "[n]ot a single respondent [in a survey given to police departments] said or even suggested that a police officer

should search a vehicle while the arrestee is in the vehicle or unsecured." Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 Wisc. L. Rev. 657, 676. "If it was ever true that the passenger compartment is 'in fact generally, even if not inevitably,' within the arrestee's immediate control at the time of the search, . . . it certainly is not true today." *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in the judgment) (internal citations omitted).

Belton thus rests upon an indefensible legal fiction. As the Ninth Circuit matter-of-factly explained, when "the arrestee [i]s handcuffed and secured in a patrol car before the police conduct[] the search, the rational underpinnings of *Belton*—officer safety and preservation of evidence—are not implicated." *Weaver*, 433 F.3d at 1107; *see also Commonwealth v. Santiago*, 575 N.E.2d 350, 353-54 (Mass. 1991) (When "[t]he automobile was no longer within the defendant's immediate control[,] [t]here obviously was no danger that he could draw a weapon from the vehicle or attempt to conceal or destroy contraband which remained in it."). Or as Justice Scalia put it somewhat more colorfully, the notion that an arrestee handcuffed and secured in the back of an officer's squad car might nevertheless grab a weapon or evidentiary item inside another automobile "calls to mind . . . the mythical arrestee 'possessed of the skill of Houdini and the strength of Hercules.'" *Thornton*, 541 U.S. at 626 (Scalia, J., concurring in the judgment) (quoting *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973)).

But instead of responding to this reality by somehow limiting *Belton*, courts have shifted their attention from suspects' locations at the time of *searches* to their locations at the time of their *arrests*. *See Thornton*, 541 U.S. at 621-23; *United States v. Sholola*, 124 F.3d 803, 817-18 (7th Cir. 1997) (collecting decisions to this effect). So long as arrestees were "recent occupants" of vehicles at the time of their arrest, courts

have concluded that *Belton* allows officers to search their vehicles even after the arrestees have been driven away in patrol cars, *United States v. McLaughlin*, 170 F.3d 889 (9th Cir. 1999); *United States v. McCrady*, 774 F.2d 868 (8th Cir. 1985), and when the police have moved the arrestee's vehicle prior to the search, *United States v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005).

But this shift in focus only makes matters worse. It "abandon[s] our constitutional moorings and float[s] to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find." *McLaughlin*, 170 F.3d at 894 (Trott, J., concurring); *see also Thornton*, 541 U.S. at 629 (Scalia, J., concurring in the judgment) ("agree[ing] entirely with that assessment"). "[W]ide-ranging exploratory searches" are exactly the kinds of searches that "the Framers [of the Fourth Amendment] intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987); *accord Thompson v. Louisiana*, 469 U.S. 17 (1984). And the Framers intended to do so for a fundamental reason: If there is no identifiable criterion against which to judge the reasonableness of a search, the right to be free from unreasonable searches "evaporat[es]." *Chimel*, 395 U.S. at 765.

2. Because the current doctrine is untethered to any safety or evidence-preservation concerns, it also is prone to abuse. A majority of states allows police officers to arrest motorists for *any* traffic violation, and all states allow arrests for some such violations. *See* David S. Rudstein, Belton *Redux: Reevaluating* Belton*'s Per Se Rule Governing the Search of an Automobile Incident to an Arrest*, 40 Wake Forest L. Rev. 1287, 1335 (2005); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 250-51 nn.188-89 (1989). And this Court has

recently made clear that the Fourth Amendment permits officers to make such arrests, no matter how minor the violations. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (failure to wear seatbelt); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam) (speeding). The Fourth Amendment also allows officers to use suspected traffic violations as pretexts for stopping people who they really want to scrutinize for other reasons—whether those reasons are grounded in stereotypes, unsubstantiated hunches, or other shaky assumptions. *Whren v. United States*, 517 U.S. 806 (1996); *see also Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting).

The upshot of all this is that the current search-incident-to-arrest doctrine encourages officers to arrest people whom they would not otherwise arrest, in order to conduct exploratory searches they would not otherwise be allowed to conduct. When *Belton* itself was decided, Justice Stevens observed in its companion case that:

> [U]nder the Court's new rule, [an] arresting officer may find reason to [take motorists into custody] whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation. That decision by a police officer will therefore provide the constitutional predicate for broader vehicle searches than any neutral magistrate could authorize by issuing a warrant.

Robbins, 453 U.S. at 452 (Stevens, J., dissenting). Time and experience has borne out this concern. It is now an accepted truth that "the *Belton* rule, as applied to arrests for traffic offenses, creates an unwarranted incentive for police officers to 'make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits.'" *State v. Pierce*, 642 A.2d 947, 961 (N.J. 1994) (quoting 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 7.1(c) (2d ed. 1987)).

One state supreme court justice, for example, recently recounted police officers' admissions that "[t]he secret" to getting more drug seizures was pulling over motorists for "any and all [traffic] violations" (bad headlights, for example) and then "going beyond the traffic stop." *State v. Pallone*, 613 N.W.2d 568, 588 n.9 (Wisc. 2000) (Abrahamson, C.J., dissenting) (internal quotations and citation omitted). The officers did not divulge how often such arrests and searches result in nothing more than prolonged invasions of privacy. But given that the officers, by hypothesis, lack probable cause in all of these pretextual stops to believe the drivers are guilty of any drug offense, "we must assume that a significant number of innocent persons" are included in this ongoing dragnet. *United States v. Montoya de Hernandez*, 473 U.S. 531, 545 (1985) (Stevens, J., concurring in the judgment).

3. Even putting all of these problems aside, *Belton* should be reconsidered because it has failed on its own terms. This Court in *Belton* emphasized that a "highly sophisticated set of rules" in this area, "qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions . . . may be literally impossible of application by the officer in the field." 453 U.S. at 458 (internal quotations and citations omitted); *see also Thornton*, 541 U.S. at 622-23 (emphasizing "[t]he need for a clear rule, readily understood by police officers"). Consequently, the chief virtue of the *Belton* rule is supposed to be that it provides "straightforward" and "workable" guidance to police officers and individuals alike. *Belton*, 453 U.S. at 459-60.

But in practice, the *Belton* rule provides anything but clear guidance. This Court has advised only that "an arrestee's status as a 'recent occupant' *may* turn on his temporal *or* spatial relationship to the car at the time of the arrest *and* search." *Thornton*, 541 U.S. at 622 (emphasis added). Consequently, police officers, individuals, and courts "are left with little guidance in determining an arrestee's status as a

'recent occupant.'" *Rainey*, 197 S.W.3d at 94. There is no hard-and-fast rule with respect to spatial proximity. *See supra* at 9-12. Nor is there any real predictability with respect to temporal proximity. The law with respect to timing—as the note in the margin indicates—"now reads something like, 'well, thirty-minutes [sic] is too long, but five minutes is okay and you can delay if you are filling out paperwork but not if you are interrogating or transporting the defendant.' So much for bright lines." *McLaughlin*, 170 F.3d at 895 (Trott, J., concurring).[5]

The predictable result of this uncertainty—as exemplified by this case—is a highly fact-bound and unstable patchwork of jurisprudence. *See* App. 6a ("The precise context is important to the reasonableness of the search."); *United States v. Scott*,

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[5] Courts have deemed searches "contemporaneous" with arrests when police have searched the arrestee's vehicle before arresting the suspect, *United States v. Smith*, 389 F.3d 944 (9th Cir. 2004), *cert. denied*, 544 U.S. 956 (2005); *State v. Mounds*, 840 A.2d 29 (Conn. App. Ct. 2004); "immediately" after the arrest, *McCrady*, 774 F.2d at 871-72; *Penman*, 194 S.W.3d 237, 241; "shortly" after the arrest, *Sholola*, 124 F.3d at 810; fifteen minutes after the arrest, *Weaver*, 433 F.3d at 1106; and fifty minutes after the arrest, *United States v. Scott*, 428 F. Supp. 2d 1126 (E.D. Cal. 2006). On the other hand, courts have deemed searches invalid when officers have conducted them before the suspect was arrested, *United States v. Powell*, 451 F.3d 862 (D.C. Cir. 2006), *reh'g en banc granted*, 2006 U.S. App. LEXIS 29147 (Nov. 22, 2006); "significantly after the arrest," *Strong v. State*, 138 S.W.3d 546, 555 (Tex. App. 2004); and thirty-five to forty minutes after the arrest, *United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987). Additional confusion arises when the police have removed the suspect from the scene before initiating or completing their search of his car. One court has deemed a search valid where the police removed the suspect five minutes before the search began. *McLaughlin*, 170 F.3d at 890-91. Another court has held that a search was valid where the suspect was driven away two and one-half minutes into a three-minute search. *United States v. Doward*, 41 F.3d 789 (1st Cir. 1994). A third court, however, has deemed a search invalid where an officer, who did not realize another officer had driven the arrestee off the premises, found contraband minutes after the arrestee's departure. *State v. Badgett*, 512 A.2d 160 (Conn. 1986).

428 F. Supp. 2d 1126, 1131 (E.D. Cal. 2006) ("[I]t is necessary to look at the facts and circumstances of each case . . . ."); *Rainey*, 197 S.W.3d at 95 ("While there is no hard and fast definition of what constitutes 'recent' both in time and distance, *on the facts of this case*, Appellant was a 'recent occupant' and was sufficiently close to the vehicle, in both time and space, for the concerns of *Belton* and *Thornton* to be applicable.") (emphasis added). And things are only getting worse. One district court, earnestly trying to make sense of *Belton* and *Thornton*, recently held that "facts regarding spatial proximity alone . . . may establish a presumption of control over the vehicle," while "facts regarding temporal proximity, while not necessary to establish control, may nevertheless serve to rebut that presumption of control for purposes of determining whether the *Belton* rule should apply." *Mack v. City of Abilene*, 2005 WL 1149807, at *11 (N.D. Tex. May 12, 2005), *aff'd in part and vacated in part on other grounds*, 461 F.3d 547 (5th Cir. 2006). Another district court recently adopted a four-factor balancing test in which no single factor is determinative. *United States v. Laughton*, 437 F. Supp. 2d 665, 672-73 (E.D. Mich. 2006). Such matrices of presumptions and burden-shifting directives are hardly the stuff of straightforward predictability. To the contrary, such *ex post*, fact-sensitive frameworks "plac[e] police officers in the position of making precisely the sort of *ad hoc* determinations *Belton*'s bright-line rule sought to avoid." App. 15a (Gibson, J., dissenting) (internal citations omitted).

B. Traditional Fourth Amendment Principles Prohibit Officers from Conducting Exploratory Searches Incident to Arrests for Nothing More than Traffic Offenses.

There is no need for this Court to perpetuate the current unsatisfactory state of affairs. Traditional Fourth Amendment principles provide ready alternatives to *Belton*'s legal fictions with respect to cases like this one. These alternatives would

not alter the outcomes of any of this Court's prior decisions, but they would provide a truly workable and accessible doctrine, thereby relieving police officers of the need to make fact-bound inquiries and hairline distinctions at the scenes of arrests.

1. In his *Thornton* concurrence, Justice Scalia noted that numerous common law authorities, as well as early authorities from this Court and others, justified searches incident to arrest based simply on a "general interest in gathering evidence relevant to the crime for which the suspect had been arrested." 541 U.S. at 629 (Scalia, J., concurring in the judgment). He thus suggested that if the holdings of *Belton* and *Thornton* make sense at all, it must be on the ground that officers there were entitled to search the arrestees' vehicles "because the car[s] might contain evidence relevant to the crime for which [they were] arrested." *Id.* Both arrestees, after all, were arrested for drug offenses, so it was reasonable to believe that evidence related to those offenses might be found in the vehicles in which they had just been driving and which were still in the vicinity at the time of arrest. *Id.* at 632.

Recasting *Belton* in these terms would not only place the search-incident-to-arrest doctrine "on firmer ground," *id.* at 625 (O'Connor, J., concurring in part), but it would make clear that in cases such as this officers are not allowed to conduct exploratory searches of vehicles incident to arrest. As Justice Scalia explained:

> A motorist may be arrested for a wide variety of offenses; in many cases, there is no reasonable basis to believe relevant evidence might be found in the car. *See Atwater v. Lago Vista*, 532 U.S. 318, 323-34 (2001); *cf. Knowles v. Iowa*, 525 U.S. 113, 118 (1998). I would therefore limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.

Id. at 632 (Scalia, J., concurring in the judgment). Because there is no way that the officers here could have believed that they would find evidence in Petitioner's vehicle relevant to the offense of driving with a suspended license, their exploratory search of his pickup truck's passenger compartment clearly violated this conception of the Fourth Amendment.[6]

2. At the very least, this Court should take this opportunity to hold that law enforcement officers may not conduct vehicular searches incident to arrests for nothing more than traffic violations. Such violations, by definition, fail to give officers any reason to believe they might find evidence related to the crimes of arrest by searching arrestees' cars. So such violations, under the framework advanced in Justice Scalia's *Thornton* concurrence, would not give officers the right to conduct vehicular searches.

What is more, prohibiting searches incident to arresting motorists for traffic violations has a substantial pedigree on its own terms. The "general rule" prior to *Belton* was that exploratory vehicular searches could not be justified solely on the basis of contemporaneous traffic arrests. *Pierce*, 642 A.2d at 962; *accord* P.A. Agabin, Annotation, *Lawfulness of Search of Motor Vehicle Following Arrest for Traffic Violation*, 10 A.L.R.3d 314, 319-20 (3d ed. 1966) ("relatively well settled" that such "exploratory" searches were unreasonable); *id.* at 388-45 (collecting several cases). Officers were permitted to search arrestees' vehicles only if "[p]robable cause in the form of an occurrence arising after arrest for a traffic violation [gave] rise to the arresting officer's belief that defendant ha[d] committed another offense." *Id.* at 345. Indeed, at least one

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[6] Because officers could reasonably have thought they would find evidence of a crime for which the defendant in was arrested in *Rainey*—driving under the influence of intoxicants—this case appears to be a better vehicle than that one for reconsidering *Belton* along this line of reasoning. *See Rainey v. Commonwealth*, 197 S.W.3d 89 (Ky. 2006), *petition for cert. filed*, No. 06-720 (U.S. Nov. 21, 2006).

state, after an exhaustive analysis in a case involving driving with a suspended license, has continued to follow this rule on state constitutional grounds. *See Pierce*, 642 A.2d at 953-58.

The mid-century understanding of the right against unreasonable searches and seizures also barred using an arrest for a traffic offense as "a pretext to search for evidence" of some other suspected crime. Annotation, 10 A.L.R.3d at 322 (collecting several cases). When there is "no reason to believe that anything more than a traffic violation ha[s] occurred," officers should not have an incentive to use a traffic arrest as justification for conducting a "broader search than any neutral magistrate could authorize by issuing a warrant." *Robbins*, 453 U.S. at 452 (Stevens, J., dissenting). This case provides a perfect illustration. The officers here, as the magistrate found, "were more interested in whether defendant could be arrested for drug trafficking than they were in completing the arrest for [Petitioner's traffic] offense." App. 32a. But their suspicion that Petitioner was involved in drug trafficking fell "far short" of probable cause. *Id.* So the officers used Petitioner's apparent traffic violation as an excuse to pull him over, detain him, and comb through the interior of his pickup truck for over forty minutes. That the officers happened to find evidence during this search of a different crime than they surmised Petitioner might be committing should not distract this Court from the reality that the officers, at bottom, conducted a pretext arrest and search and failed to find any evidence of the kind they were actually seeking.

Finally, prohibiting searches incident to arresting motorists for traffic violations would eliminate the disconnect between the *Belton* doctrine and this Court's decision in *Knowles v. Iowa*, 525 U.S. 113 (1998). *Knowles* held that officers may not conduct a search incident to issuing a citation for a traffic violation (in that case, speeding), in part because no evidence of such a violation can exist in the passenger compartment of the car. *Id.* at 118.

Knowles thus leaves officer safety as the only possible justification for continuing to allow searches incident to *arrests* for such violations. But as this case demonstrates, officers are *less* at risk when they arrest motorists for traffic violations than when they issue citations for such violations. Petitioner was handcuffed in the back seat of a patrol car during the entire time the officers searched his car, and then he was taken directly to the police station. Only if the officers had let Petitioner go with a citation would he have gained access to his truck and had any ability to threaten the officers. Hence, the Eighth Circuit's holding that the Fourth Amendment actually gave the officers the authority to search Petitioner's car when they decided *not* to let Petitioner go with a citation (App. 6a-7a) "illuminates the absurdity associated with allowing purely exploratory searches incident to arrest," at least when there is no possibility that evidence relevant to the crime of the arrest will be found in the vehicle. *McLaughlin*, 170 F.3d at 895 (Trott, J., concurring).

The *Belton* rule, in short, should be reassessed and limited—for the good of defendants, the police, and the integrity of this Court. This case is an excellent vehicle to do so. It exemplifies all that is wrong with the rule, and the record even contains a complete videotape so this Court can examine for itself the empirical realities of this realm of Fourth Amendment law. There is no need to leave the law in post-*Thornton* limbo any longer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 2006

APPENDIX

APPENDIX A

United States Court Of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-2111

United States of America, Appellant, v. Zachary Hrasky, Appellee.	* * * * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska

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Submitted: October 13, 2005
Filed: July 18, 2006

Before: RILEY, JOHN R. GIBSON, and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

Zachary Hrasky was charged by a grand jury with unlawful possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. § 922(g)(1). Prior to trial, he moved to suppress evidence, including two firearms, obtained during a search of his vehicle. The district court granted the motion, and the government appeals. *See* 18 U.S.C. § 3731. We reverse.

I.

On July 2, 2004, at approximately 3:45 p.m., Nebraska State Trooper Jeff Wallace stopped a truck driven by Hrasky in Scotts Bluff County, Nebraska. Wallace had reason to believe that Hrasky was driving without a proper license, so he brought Hrasky to the patrol car and made further inquiry. Trooper Wallace then determined that Hrasky was driving on a suspended license and that this was his third such offense. Based on this information, Wallace handcuffed Hrasky and placed him in the back of the patrol car.

When Wallace informed Hrasky that he would not be released with a citation, Hrasky immediately expressed a strong aversion to going to jail and asked whether he could instead speak with a narcotics investigator about his knowledge of drug crimes in the area. Trooper Wallace acceded to Hrasky's request and summoned Investigator Cody Enlow, a member of the Western Intelligence Narcotics Group Task Force. Enlow arrived at the scene of the traffic stop shortly after 4:00 p.m., and entered Wallace's patrol car to speak with Hrasky.

Enlow spoke with Hrasky for approximately 45 minutes about becoming a confidential informant. During that time, Trooper Wallace reserved judgment on whether Hrasky would be subjected to a full custodial arrest and transported from the scene. If Investigator Enlow reached an agreement with Hrasky involving cooperation in drug trafficking investigations, Wallace was prepared to consider simply giving Hrasky a ticket and releasing him. Ultimately, however, it became apparent to Investigator Enlow that Hrasky was "not in a position or not ready to make" a commitment to help law enforcement. Enlow thus told Trooper Wallace that Enlow was not "going to do anything" with Hrasky, and that Wallace should proceed as he would have done before Hrasky broached the possibility of cooperation.

At approximately 5:05 p.m., Trooper Wallace, Investigator Enlow, and another officer who had arrived at the scene began a search of Hrasky's truck. While searching the passenger area of the truck's extended cab, Enlow encountered a plastic insert covering a small cubby hole. The insert was loose, so Enlow pulled it up, and he discovered two handguns beneath the plastic.

After the search was completed, Trooper Wallace called a tow truck to remove Hrasky's vehicle. The tow truck arrived at approximately 5:53 p.m., and Hrasky was then taken to jail. After he was indicted for possession of the weapons found within his truck cab, Hrasky moved to suppress the evidence uncovered during the search, arguing that it was the fruit of an unreasonable search conducted in violation of the Fourth Amendment. A magistrate judge, finding a "close question" whether the search was permissible as a contemporaneous incident of Hrasky's arrest, recommended that the defendant's motion to suppress be granted. The district court later adopted the magistrate's report and recommendation. Although the court agreed that the initial traffic stop was constitutional, it held that the search was not incident to Hrasky's arrest because it was not "contemporaneous" with the arrest. The court also rejected the government's alternative contention that the search was permissible as a standard inventory of the vehicle. On appeal, the government contends only that the search was consistent with the Fourth Amendment as a search incident to Hrasky's arrest.

II.

We are required once again to apply the "bright-line" rule of *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), which provides that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."

Id. at 460. *Belton* built on *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), which held that a lawful custodial arrest establishes authority to conduct a full search of the arrestee's person, and that such a search is "not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." 414 U.S. at 235. *Robinson* observed that a lawful custodial arrest, involving "the taking of a suspect into custody and transporting him to the police station," creates extended exposure to the arrestee that presents heightened danger to the arresting officer. *Id.* While the authority to search was "based upon the need to disarm and to discover evidence," the Court held that this authority "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id.*

Belton similarly rejected the contention that "'there must be litigated in each case the issue of whether or not there was present one of the reasons'" supporting a search incident to arrest. 453 U.S. at 459 (quoting *Robinson*, 414 U.S. at 235). The Court sought to establish a "workable rule" for this category of cases, because "[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *Id.* at 459-60. Thus, in the case of a full custodial arrest of an "occupant" or "recent occupant" of a vehicle, *id.* at 460, the police may search the passenger compartment of the vehicle as "a contemporaneous incident" of that arrest. Such a search to ensure safety and to preserve evidence is "reasonable" under the Fourth Amendment. *Thornton v. United States*, 541 U.S. 615, 623, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004). "The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an

arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated." *Id.* at 622-23.

Applying the *Belton* rule, our court has upheld searches of automobiles incident to arrest where the arrestee has exited the vehicle and has been handcuffed and placed in a police officer's patrol car, *e.g.*, *United States v. Barnes*, 374 F.3d 601, 603 (8th Cir. 2004), or even removed from the scene entirely. *United States v. Snook*, 88 F.3d 605, 606-08 (8th Cir. 1996); *United States v. McCrady*, 774 F.2d 868, 871-72 (8th Cir. 1985). Similar cases from other courts of appeals "are legion." *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in judgment) (citing cases). Because *Belton* established a "bright-line rule" permitting searches regardless of whether there is actual concern for safety or evidence in a particular case, the analysis in these decisions has focused on whether the search is "roughly contemporaneous with the arrest" or conducted within a "reasonable time" after obtaining control of the vehicle. *E.g.*, *United States v. McLaughlin*, 170 F.3d 889, 891-92 (9th Cir. 1999). It has been thought that incapacitation of the arrestee does not make a subsequent search of the vehicle unreasonable (on the theory, for example, that the search is not "contemporaneous *with* the arrest"), because *Belton*'s "circumspect use of the discrete phrase 'contemporaneous *incident* of that arrest' . . . plainly implies a greater temporal leeway between the custodial arrest and the search." *United States v. Doward*, 41 F.3d 789, 793 (1st Cir. 1994) (emphasis added by *Doward*). Despite some recent interest in rethinking the doctrine, *Thornton*, 541 U.S. at 624 (O'Connor, J., concurring in part); *id.* at 628 (Scalia, J., concurring in judgment), the binding authorities from our court are consistent with the prevailing rationale, and they guide our analysis here.

Under the *Belton* framework, we see merit in the view that the determination whether a search is a "contemporaneous" incident of an arrest involves more than simply a temporal analysis. In the context of a rule whose

applicability does not depend on the presence of one of the specific reasons supporting a search incident to arrest, it is sensible to conclude that "a search need not be conducted immediately upon the heels of an arrest, but sometimes may be conducted well after the arrest, so long as it occurs during a continuous sequence of events." *United States v. Smith*, 389 F.3d 944, 951 (9th Cir. 2004). The focus should be "not strictly on the timing of the search but its relationship to (and reasonableness in light of) the circumstances of arrest." *Id.* Like our court in *Snook* and *McCrady*, the Ninth Circuit approved a search as incident to an arrest, even though it was conducted five minutes after the defendant was removed from the scene, because the arrest, the completion of required paperwork, and the subsequent search were "one continuous series of events closely connected in time." *United States v. McLaughlin*, 170 F.3d at 893. While we have said in *dicta* that the temporal analysis for searches of luggage belonging to an arrestee is "constitutionally fairly strict," *Curd v. City Court of Judsonia*, 141 F.3d 839, 843 (8th Cir. 1998), this observation is not inconsistent with framing "the determinative question" as "whether the time and distance between elimination of the danger and performance of the search were reasonable." *United States v. Han*, 74 F.3d 537, 543 (4th Cir. 1996).

The precise context is important to the reasonableness of the search, and it is significant that during the sixty minutes that Hrasky was in the patrol car, the officers were unsure whether he would be transported to the police station for booking, or released at the scene with only a citation. A police officer seeking to apply the Supreme Court's "bright-line rules" reasonably could be concerned, if the police elected merely to issue a citation, whether a search incident to the initial arrest would have been unauthorized. *Cf. Knowles v. Iowa*, 525 U.S. 113, 118-19, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998) (holding that "search incident to citation" violated Fourth Amendment). It was only after Hrasky was deemed unable or unwilling to assist law enforcement that the trooper

determined to make a "full custodial arrest" in the sense that underlies the doctrine of searches incident to arrest—"the taking of a suspect into custody and transporting him to the police station." *Robinson*, 414 U.S. at 235; *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 324, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001); *id.* at 363-64 (O'Connor, J., dissenting).[1] The search of Hrasky's truck certainly was contemporaneous with this decision to proceed with a full custodial arrest. Although an hour had elapsed since the initial detention, we think that it was still reasonable for police to consider Hrasky a "recent occupant" of the truck. The episode began with an encounter between the trooper and Hrasky at the vehicle, and the search was the culmination of a continuing series of events at the scene arising from the traffic stop. *See United States v. Fiala*, 929 F.2d 285, 288 (7th Cir. 1991) (holding that search involved "straightforward" application of search incident to arrest doctrine, where defendant was arrested for driving without license, but search was not conducted until drug-sniffing dog arrived ninety minutes after arrest); *State v. Smith*, 120 Idaho 77, 813 P.2d 888, 891 (Idaho 1991) (holding that search of car at scene of arrest conducted thirty minutes after arrest was constitutional).

The scenario in this case is quite different from the unreasonable search in *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), *overruled in part on other grounds by California v. Acevedo*, 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991), where police searched a locked footlocker found in the trunk of a vehicle belonging to an arrestee, but did so ninety minutes after the arrest, at a time

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[1] The Magistrate Judge relied in part on an assumption that because "a tow truck had already been called" while Hrasky bargained for his release, the vehicle would have been impounded even if Hrasky had been released with a citation. A videotape of the incident, however, hows that a tow truck was not summoned until more than thirty minutes after officers began their search of Hrasky's vehicle.

when the suspects, the car, and the footlocker had been transported from the scene of the arrest to the local federal building. *Id.* at 15; *see also United States v. Wells*, 347 F.3d 280, 287 (8th Cir. 2003) (declining to sanction search of automobile as one incident to arrest where arrestee and vehicle were removed from scene of arrest, and vehicle was searched at police station according to standard procedure for inventory searches). The search here took place at the scene of the arrest, immediately after the police determined to proceed with a full custodial arrest. We also find this case distinguishable from *United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987), where police searched an arrestee's car some thirty to forty-five minutes after he was arrested, handcuffed, and placed in a patrol car. There was no doubt from the outset that Vasey would be subjected to a full custodial arrest, because the police learned immediately of an outstanding arrest warrant for possession of dangerous drugs. *Id.* at 784. The events between the initial detention and the search were not, as here, part of a continuing series of events related to effecting the full custodial arrest, but rather involved other avenues of investigation by the officers, including interrogation of the arrestee. *Id.* at 787; *see McLaughlin*, 170 F.3d at 892.

We are faced here with an unusual situation in which the arrestee initiated discussions with officers in an effort to persuade them to issue a citation in lieu of carrying out a full custodial arrest. Once the events played out, and the officers determined to make a full custodial arrest, the search of Hrasky's vehicle was conducted immediately. We think a police officer relying on *Belton* for a "clear rule, readily understood by police officers," *Thornton*, 541 U.S. at 623, would justifiably be confused to learn that he is authorized to search a vehicle after a suspect undoubtedly destined for full custodial arrest is handcuffed and placed in a patrol car at the scene, *Barnes*, 374 F.3d at 603, and even after a suspect has been placed in a patrol car and removed from the scene, *Snook*, 88 F.3d at 606-08; *McCrady*, 774 F.2d at 871-72, but not

authorized to search a car immediately after an arrestee, still at the scene, unsuccessfully attempts to negotiate his release with a citation. Under existing doctrine as developed under *Belton*, we conclude that the search was reasonable.

The order of the district court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent. On July 2, 2004, at 3:45 p.m. Nebraska State Trooper Jeff Wallace stopped the truck driven by Zachary Hrasky, having reason to believe that he was driving without a proper license. When this proved to be true, the trooper handcuffed Hrasky and placed him in the back of the patrol car. Shortly after 4:00 p.m., an investigator arrived at the scene and spoke with Hrasky in the patrol car for the next forty-five minutes. Finally, at 5:05 p.m., officers began a search of Hrasky's truck and found two handguns.[2] The question before us is whether this warrantless search of Hrasky's truck, which occurred more than one hour after Hrasky's arrest for driving with a suspended license, falls on the permissible side of the "bright-line" rule of *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). Because, unlike the majority, I believe that it does not, I would affirm the district court's order suppressing the firearms.

"[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth

[2] This is the timing and sequence of events as found by the magistrate judge, and which a review of the videotape made by the officer's dashboard camera confirms.

Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)). One such exception permits the warrantless search of a vehicle's passenger compartment "as a contemporaneous incident" of the arrest of that vehicle's occupant or recent occupant. *Belton*, 453 U.S. at 460-61. Although "[s]uch searches have long been considered valid because of the need 'to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape' and the need to prevent the concealment or destruction of evidence," *id.* at 457 (quoting *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)), it is equally well-established that "[s]earches incident to arrests are not limitless." *United States v. Pratt*, 355 F.3d 1119, 1121-22 (8th Cir. 2004). Instead, they are to be treated as the exception to Constitutional norms that they are, lest officers in the field treat them as a "police entitlement." *Thornton v. United States*, 541 U.S. 615, 624, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (O'Connor, J., concurring); *United States v. Barnes*, 374 F.3d 601, 605 (8th Cir. 2004) (Smith, J., dissenting), *cert. denied*, 543 U.S. 1079, 125 S. Ct. 938, 160 L. Ed. 2d 822 (2005); *see also Thornton*, 541 U.S. at 627 (Scalia, J., joined by Ginsburg, J., concurring) ("But conducting a *Chimel* search is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful."). Although the Supreme Court has made it clear that courts are not to determine on a case-by-case basis whether or not one of the *Chimel* justifications was present, *Belton*, 453 U.S. at 459 (quoting *United States v. Robinson*, 414 U.S. 218, 235, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)), it nonetheless remains the government's burden to establish its entitlement to the search incident to arrest exception; if the government fails to make such a showing, the evidence must be suppressed. *See Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).

To invoke the search incident to arrest exception, the government must first demonstrate that there was a "lawful custodial arrest." *Belton*, 453 U.S. at 460; *see also United States v. Wells*, 347 F.3d 280, 287 (8th Cir. 2003) ("Once [defendant] was arrested, law enforcement was authorized to conduct a search incident to the arrest."). We have previously held that, for purposes of *Belton*, "a seizure of a person predicated upon probable cause is properly regarded as an arrest." *Pratt*, 355 F.3d at 1123. Police had probable cause to believe that Hrasky was driving under suspension when Trooper Wallace handcuffed him and placed him in the patrol car. Therefore, as the magistrate judge correctly recognized and notwithstanding the majority's suggestion to the contrary,[3] it was at this point that Hrasky was under arrest for purposes of *Belton*, since it was at this point that "a reasonable person would have believed that he was not free to leave." *Pratt*, 355 F.3d at 1122 (quoting *California v. Hodari D.*, 499 U.S. 621, 628, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991)).

Thus, having established that Hrasky was subject to a lawful custodial arrest for driving while suspended at the point when he was handcuffed and placed in the patrol car, the government must then show that the search of Hrasky's truck, which occurred more than one hour later, was "a contemporaneous incident of that arrest." *Belton*, 453 U.S. at 460. Admittedly, a review of the law in this area demonstrates

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[3] The majority suggests that the search took place "immediately after the police determined to proceed with a full custodial arrest," Maj. at 7, and finds it "significant" that "the officers were unsure whether [Hrasky] would be transported to the police station for booking, or released at the scene with only a citation." Maj. at 6. This is irrelevant to the question of whether Hrasky was subject to a "lawful custodial arrest" within the meaning of *Belton*. *Pratt*, 355 F.3d at 1124 ("An officer's uncommunicated subjective intent is irrelevant to the question of whether an individual has been seized.") (citing *United States v. Mendenhall*, 446 U.S. 544, 554 n.6, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); *United States v. Bloomfield*, 40 F.3d 910, 916 (8th Cir. 1994) (en banc)).

that "what is 'contemporaneous' is in the eye of the beholder." *United States v. Smith*, 389 F.3d 944, 954 (9th Cir. 2004) (Wardlaw, J., concurring), *cert. denied*, 544 U.S. 956, 125 S. Ct. 1721, 161 L. Ed. 2d 538 (2005). Nonetheless, it is well-established that "[s]earches incident to arrest have both a geographic and temporal limitation." *United States v. Currence*, 446 F.3d 554, 557 (4th Cir. 2006); *see also Thornton*, 541 U.S. at 622 ("[A]n arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search."); *United States v. Doward*, 41 F.3d 789, 792 (1st Cir. 1994) (discussing "temporal and spatial limits of the bright-line rule announced in *Belton*"). Thus, if a search is too "remote in time or place" it cannot be fairly characterized as a contemporaneous incident of the arrest, since the justifications permitting the search to be conducted without a warrant no longer apply. *Chimel*, 395 U.S. at 754 (quoting *Preston v. United States*, 376 U.S. 364, 367, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964)); *United States v. Chadwick*, 433 U.S. 1, 15, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), *overruled in part on other grounds by California v. Acevedo*, 500 U.S. 565 (1991).

The search here, conducted at the scene of the arrest, does not run afoul of the geographical limitation, notwithstanding the fact that a handcuffed Hrasky, held in the back seat of a patrol car, would have been hard-pressed to reach either evidence or weaponry stowed in the passenger compartment of his truck. *See, e.g.*, *Barnes*, 374 F.3d at 604 ("The lawfulness of the search does not depend on whether the occupant was actually capable of reaching the area during the course of the police encounter.") (emphasis in original); *see also Thornton*, 541 U.S. at 626 (Scalia, J., concurring, joined by Ginsburg, J., concurring) (recalling Justice Goldberg's reference to "the mythical arrestee 'possessed of the skill of Houdini and the strength of Hercules.'") However, the greater than one-hour delay here between the arrest and the search does run afoul of the temporal limitation.

For a search incident to an arrest to be timely it must be "substantially contemporaneous" with the arrest. *Stoner v. California*, 376 U.S. 483, 486, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964). Although this does not mean it must be "made at the same time" as the arrest, see Webster's Third New International Dictionary, 391 (1981) (defining "contemporaneous"), we have nonetheless characterized the timeliness requirement as "constitutionally fairly strict." *Curd v. City Court of Judsonia*, 141 F.3d 839, 843 (8th Cir. 1998). Thus, we require police to conduct the search "hard upon the heels of the arrest." *Wells*, 347 F.3d at 287 (holding that where facts created doubt as to whether search followed closely after arrest, court would not sanction search as "contemporaneous" incident of arrest); *see also United States v. Castaneda*, 438 F.3d 891, 894 (8th Cir. 2006) (distinguishing a *Belton* vehicle search from a warrantless search conducted pursuant to the automobile exception, since under the latter, "the vehicle need not be immediately searched."). Accordingly, we routinely sanction searches as incident to arrest where they are conducted shortly after an arrest. *E.g.*, *Barnes*, 374 F.3d at 603 (immediately after arrest); *United States v. McCrady*, 774 F.2d 868, 871-72 (8th Cir. 1985) (same); *United States v. Snook*, 88 F.3d 605, 606 (8th Cir. 1996) (approximately five minutes after arrest).

We have not, however, until today, approved of a delay between an arrest and a warrantless search claimed to be an incident of it, anywhere near as lengthy as the delay that occurred here. Nor would we have had any reason to, since the Supreme Court has refused to apply the search incident to arrest exception in the context of a similar delay, *Chadwick*, 433 U.S. at 15 (holding that evidence obtained from search conducted ninety minutes after arrest must be suppressed because "no exigency" justified the search as incident to the arrest), and other Circuits have, for the most part, followed suit. *See, e.g.*, *United States v. $ 639,558 in U.S. Currency*, 293 U.S. App. D.C. 384, 955 F.2d 712, 716-18 (D.C. Cir. 1992) (holding

that a thirty to forty-five minute delay rendered search too "remote in time" to sustain as incident to an arrest); *United States v. Vasey*, 834 F.2d 782, 787 (9th Cir. 1987) (search conducted thirty to forty-five minutes after arrest did not "follow[] closely on the heels of the arrest" and was therefore, too remote in time); *see also Doward*, 41 F.3d at 793 n.3 (expressly reserving question of whether delay between an arrest and search "might become so protracted as to raise judicial eyebrows in an exceptional case" and citing the delay in *Vasey* as this kind of "exceptional case."); *but see United States v. Fiala*, 929 F.2d 285, 288 (7th Cir. 1991) (holding that one and one-half hour delay between arrest and search while officers waited for drug dog to arrive was "not unreasonable").

Unlike the majority, I would follow this authority and conclude that the search here was simply too remote in time to be fairly characterized "as a contemporaneous incident" of Hrasky's arrest more than one hour earlier. *Cf. Belton*, 453 U.S. at 462 (approving a search that "followed *immediately upon* that arrest") (emphasis added). In order to reach the opposite conclusion, the majority adopts a new rule under which a search "may be conducted well after the arrest, so long as it occurs during a continuous sequence of events," Maj. at 5 (citing *United States v. Smith*, 389 F.3d 944, 951 (9th Cir. 2004); *United States v. McLaughlin*, 170 F.3d 889, 892 (9th Cir. 1999)).[4] The majority characterizes the "determinative

[4] The majority's reliance on the Ninth Circuit's decision in *Smith* is all the more problematic because the precise issue there was whether "the warrantless search of a vehicle incident to a contemporaneous arrest may precede the arrest," *id.* at 952 (emphasis added), and not how long police may delay after arresting a suspect before searching her vehicle. Smith's holding on this issue, namely that probable cause to arrest is a sufficient substitute for a custodial arrest to trigger the *Belton* rule, has been specifically rejected by at least one Circuit, see *United States v. Powell*, 451 F.3d 862, 2006 U.S. App. LEXIS 15763, 2006 WL 1715683, *6 (D.C. Cir. June 23, 2006), and is in tension with our Circuit's cases holding that it is only after a lawful custodial arrest that law enforcement may conduct a warrantless vehicle search pursuant to *Belton*. *E.g.*, *United States v.*

question" under this standard as whether the delay between search and arrest was a "reasonable" one. Maj. at 5 (quoting *United States v. Han*, 74 F.3d 537, 543 (4th Cir. 1996)); *see also* Maj. at 7 (citing *Fiala*, 929 F.2d at 288 (evaluating delay between arrest and search for reasonableness in the circumstances)). Not only does the majority's amorphous new rule appear to conflict with our Circuit's requirement that the search "follow hard upon the heels of the arrest," *Wells*, 347 F.3d at 287, it makes an "impressionistic blur" of *Belton*'s bright-line rule, *McLaughlin*, 170 F.3d at 894 (Trott, J., concurring), thereby placing police officers in the position of making precisely the sort of *ad hoc* determinations Belton's bright-line rule sought to avoid. *See Thornton*, 541 U.S. at 623; *see also United States v. Pittman*, 411 F.3d 813, 816 (7th Cir. 2005) ("Police shouldn't have to carry well-thumbed copies of the multivolume LaFave treatise on search and seizure with them wherever they go."). Admittedly, the majority's new rule may not prove problematic to apply in the run-of-the-mill situation, since the delay between arrest and search will almost always be far less than that which occurred here, *see, e.g.*, *Smith*, 389 F.3d at 947, 951 (search and arrest conducted at roughly the same time); *McLaughlin*, 170 F.3d at 891-92 (five minute delay).[5] However, by holding that, in some not-fully-

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Rowland, 341 F.3d 774, 783 (8th Cir. 2003) ("Because Rowland was not arrested, law enforcement could not have conducted a search incident to arrest pursuant to [*Belton*]"); *Wells*, 347 F.3d at 287 ("Once [defendant] was arrested, law enforcement was authorized to conduct a search incident to the arrest.").

[5] As law enforcement and reviewing courts continue to be called upon to apply *Belton*, its bright-line rule may become increasingly less illuminating, especially in close cases such as this. Indeed, some have expressed concern with the soundness of the entire *Belton* framework. *See e.g.*, *Thornton*, 541 U.S. at 624 (O'Connor, J., concurring) (noting that "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel* . . . [This is] a direct consequence of *Belton*'s shaky foundation."); *Thornton*, 541 U.S. at 625, 632 (Scalia, J.,

delineated circumstances constituting a "continuous sequence of events," officers may conduct a warrantless search of a vehicle, even when more than an hour has elapsed since the arrest, the majority comes dangerously close to "transform[ing] the search incident to arrest exception into a search *following* arrest exception." *Vasey*, 834 F.2d at 788 (emphasis in original). The Constitution provides for no such exception.

For these reasons, I conclude that the search of Hrasky's truck fell on the impermissible side of Belton's bright-line. Accordingly, I would affirm the well-reasoned order of the district court.

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concurring, joined by Ginsburg, J., concurring) (arguing that the majority's "effort to apply [*Belton*] to this search stretches it beyond its breaking point" and suggesting instead that the Court "limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."); *Belton*, 453 U.S. at 463-64 (Brennan, J., dissenting) (fearing that the *Belton* majority "may signal a wholesale retreat from our carefully developed search-incident-to-arrest analysis" by "formulating an arbitrary 'bright-line' rule . . . that fails to reflect *Chimel*'s underlying policy justifications"); *United States v. Weaver*, 433 F.3d 1104, 1107 (9th Cir. 2006) ("respectfully suggest[ing] that the Supreme Court may wish to re-examine this issue"); *United States v. Osife*, 398 F.3d 1143, 1147 (9th Cir.), *cert. denied*, 126 S. Ct. 417, 163 L. Ed. 2d 318 (2005) ("Moreover, it seems to us that Justice Scalia's view is more analytically sound than the prevailing approach, which relies on the legal fiction that a suspect handcuffed and locked in a patrol car might escape and grab a weapon from the passenger compartment of his own car."); *Barnes*, 374 F.3d at 605 (Smith, J., dissenting) ("I share the concerns expressed by Justices O'Connor and Scalia in *Thornton* that some may view a search incident to an arrest as 'a police entitlement.'"); *McLaughlin*, 170 F.3d at 894 (Trott, J., concurring) (stating that "in our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles"). However, the Supreme Court declined to upset *Belton* in *Thornton*, and thus it remains the standard by which to judge warrantless vehicle searches conducted as a contemporaneous incident of an arrest. *See Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	4:04CR3136
Plaintiff,	)	**MEMORANDUM AND ORDER**
vs.	)	
ZACHARY HRASKY,	)	
Defendant.	)	

This matter is before the court on a report and recommendation by Magistrate Judge Piester (filing 34) regarding the defendant's motion to suppress (filing 18), and on the government's statement of objection to the report and recommendation (filing 37), filed pursuant to NECrimR 57.3 and 28 U.S.C. § 636(b)(1).

I have conducted a de novo review of the record. I find that inasmuch as the Magistrate Judge has fully, carefully, and correctly found the facts and applied the law, the government's objections should be denied, the report and recommendation should be adopted, and the defendant's motion to suppress should be granted insofar as it requests that the government not be allowed to offer evidence at trial that two guns were seized during a warrantless, nonconsensual search of the defendant's vehicle.[1] As found in the report and recommendation, the

[1] As noted in the report and recommendation, the defendant's motion also requests suppression of certain statements that allegedly were made after the defendant was placed under arrest but before he was advised of his *Miranda* rights. Magistrate Judge Piester found that such request was mooted when the government advised at the suppression hearing that the challenged

vehicle search was neither a permissible inventory search nor a contemporaneous search incident to the defendant's arrest, as contended by the government.

Accordingly,

IT IS ORDERED that:

1) the Magistrate Judge's report and recommendation (filing 34) is adopted;

2) Plaintiff's objections to the report and recommendation (filing 37) are denied; and

3) Defendant's motion to suppress (filing 18) is granted, and Plaintiff shall not offer any evidence at trial regarding two guns that were seized from Defendant's vehicle.

DATED: April 4, 2005. BY THE COURT:

s/ Richard G. Kopf
United States District Judge

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statements would not be offered as evidence at trial, and therefore the report and recommendation does not address any Fifth Amendment claim.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	4:04CR3136
vs.	)	
ZACHARY HRASKY,	)	REPORT AND RECOMMENDATION
Defendant.	)	

The defendant has filed a motion to suppress all evidence obtained during the search of defendant's automobile on July 2, 2004.[1] Filing 18. During the search, two firearms were located in defendant's vehicle. The defendant has not challenged the traffic stop of his vehicle. He claims that following the traffic stop and his arrest for driving without a valid license, his vehicle was illegally searched in violation of the Fourth Amendment.

The search was performed by Trooper Jeff Wallace and Sergeant Stransky, both officers of the Nebraska State Patrol, and Investigator Cody Enlow of the Scottsbluff Police Department. Trooper Wallace and Sergeant Stransky characterized their search as an "inventory search," while Investigator Enlow believed it was a search incident to arrest.

[1] The defendant's motion also requests suppression of statements obtained from interrogation allegedly conducted in violation of the Fifth Amendment. The government advised the court at the suppression hearing that the challenged statements will not be offered as evidence at trial. Therefore, the Fifth Amendment claims raised by defendant's motion to suppress are moot and not addressed herein.

The defendant's initial brief in support of the motion to suppress argued the search exceeded the scope of a valid inventory search. Filing 19. The government's responsive brief did not address the inventory search issue, but argued the search was conducted incident to defendant's arrest. Filing 24. At the close of the January 26, 2005 evidentiary hearing, the parties were given leave to submit additional briefs. The defendant's supplemental brief argues the evidence found during the vehicle search is not admissible because the search was not valid as incident to his arrest. He argues the firearms obtained during the search were located in an area that was not within the defendant's immediate control at the time of the search, and the search was not conducted contemporaneous to his arrest. Filing 32. The government's supplemental letter brief states "the search is valid both as an inventory search and as a search incident to arrest."

For the reasons discussed hereafter, I conclude the officers' search of the defendant's pickup was neither a permissible inventory search nor a contemporaneous search incident to the defendant's arrest. I therefore conclude the defendant's motion to suppress should be granted.

FACTUAL FINDINGS

Based on an informant's tip, on July 2, 2004 Investigator Enlow advised the Nebraska State Patrol and the Scotts Bluff County Sheriff's Department to watch for a green full-size Chevrolet pick-up with Nebraska license plate number 21-3414 being driven by the defendant or his brother, Andrew Hrasky, near Scottsbluff, Nebraska. Investigator Enlow reported that neither the defendant nor his brother had a valid operator's license, and it was believed they may have been involved in methamphetamine sales.

At approximately 3:45 p.m., Trooper Wallace observed a person matching the defendant's description driving the previously described pickup one and one-half miles northeast

of Scottsbluff. Trooper Wallace initiated a traffic stop based on his reasonable suspicion that the defendant was driving on a suspended license. During the course of the traffic stop, the defendant admitted that his license had been suspended and was not yet reinstated. The passenger, defendant's brother, also had no valid driver's license. See Ex. 1, videotape.

The defendant had a record of two prior arrests for driving with a suspended license. This being defendant's third offense, Trooper Wallace arrested the defendant for driving under suspension, handcuffed him, and placed him in the backseat "cage" area of the officer's patrol car. Sergeant Stransky arrived at approximately 4:00 p.m. Andrew Hrasky was placed in Sergeant Stransky's patrol vehicle, but Andrew Hrasky was never arrested or handcuffed, and he later left the scene of the traffic stop on foot.

In speaking with Trooper Wallace, the defendant expressed an interest in talking to an investigator about his knowledge of drug-related crime in the area, as well as his own involvement. Trooper Wallace therefore contacted Investigator Enlow, a member of the Western Intelligence Narcotics Group Task Force, who arrived at the scene of the traffic stop shortly after Sergeant Stransky arrived. Since neither the defendant nor his brother was licensed to drive, shortly after Investigator Enlow arrived, Trooper Wallace called a tow truck to have the vehicle removed from the road. See Ex. 3, NSP policy.

Investigator Enlow spoke with the defendant for about forty-five minutes, until approximately 5:00 p.m., to assess the defendant's knowledge of illegal drug activity and determine if he was ready and willing to become a confidential informant. Trooper Wallace testified that had a confidential informant agreement been reached, he might have decided to release the defendant. However, no such agreement was reached. The defendant also was unwilling to consent to a search of his vehicle. Investigator Enlow therefore advised Trooper Wallace

to proceed as normal in arresting and processing the defendant for driving under suspension. The defendant remained handcuffed in Trooper Wallace's patrol vehicle.

Accordingly, at approximately 5:05 p.m., while the pickup remained at the scene of the traffic stop, Trooper Wallace and Sergeant Stransky began what they referred to as an "inventory search." See exs. 4 (NSP policy) and 5 (inventory). NSP policy authorizes officers to impound a motor vehicle when the driver is arrested and taken into custody and the vehicle is not lawfully parked at the driver's residence. Ex. 4 at ¶ VIII(A)(4). The policy further provides that when a vehicle is to be towed and impounded, the officers must inventory its contents. "The inventory shall include examination of the contents of the vehicle and the contents of any containers within the vehicle to ascertain the nature and quantity of the contents . . . ." Ex. 4 at ¶ VIII(B). Investigator Enlow assisted with the search but he considered it a search incident to defendant's arrest.

While searching the far right side of the rear extended cab area of the pickup, Investigator Enlow reached into a "cubby hole" compartment constructed of a molded plastic insert recessed into the side panel of the truck's passenger compartment. He discovered that the plastic insert was not firmly affixed as installed by the factory, but was loose. He easily lifted and removed it without the aid of any tools. With the molded plastic insert removed, the area of the vehicle's suspension housed in the rear fender was exposed. Investigator Enlow saw two firearms in that area.

Investigator Enlow told Trooper Wallace that firearms were found. Trooper Wallace removed the firearms, unloaded them, listed them on the vehicle inventory sheet, and placed them into evidence. See ex. 5 (inventory), items 15 & 16.

LEGAL ANALYSIS

A. Inventory Search

Irrespective of the named justification for the search, the officers performed a warrantless search of the vehicle's rear fender area by removing a plastic molded insert installed by the factory in the vehicle's passenger compartment. The arresting officer, Trooper Wallace, considered this part of his inventory search.

A warrantless inventory search of an automobile in police custody does not violate the Fourth Amendment provided it is reasonable in scope and conducted pursuant to "standard police procedures" for the purpose of "protecting the car and its contents." *United States v. Best*, 135 F.3d 1223, 1224-25 (8th Cir. 1998) (quoting *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976)). The justifications for an inventory search include protecting the owner's property while the vehicle is in police custody, protecting the police from claims that property within the vehicle was lost, stolen, or damaged; and protecting the police from potential danger. *Best*, 135 F.3d at 1224-25(citing *Opperman*, 428 U.S. at 369).

There is no evidence that prior to removing the plastic insert, the officers reasonably believed weapons were present and located in a part of the vehicle vulnerable to vandals, nor that they were concerned for the safety of citizens who might be endangered if an intruder removed the weapons such that their removal of the plastic insert and the firearms was in their role as "community caretakers." *Cady v. Dombrowski*, 413 U.S. 433 (1973) (where officer reasonably believed trunk of a towed automobile contained a gun and was vulnerable to intrusion by vandals, warrantless search of the trunk was not unreasonable under the Fourth Amendment); *United States v. Lugo*, 978 F.2d 631 (10th Cir. 1992) (search was not authorized under *Cady* absent evidence that the officer suspected a weapon was present behind the inside door panel

vent and therefore removed the vent and performed a search to protect the public from danger). *Compare United States v. Wallace*, 102 F.3d 346, 349 (8th Cir. 1996) (after driver was arrested for possession of cocaine, inventory search of vehicle's locked trunk was justified where the officer testified that in his experience, loaded firearms and explosives in the trunk can discharge and injure others during towing).

Moreover, dismantling a portion of the passenger compartment "does not qualify as 'standard police procedure,' and does not serve the purpose of 'protecting the car and its contents' under any normal construction of those terms, at least on the evidence in this record." *Lugo*, 978 F.2d at 637. The evidence is devoid of any indication that the officers reasonably should have known of the cubby hole and the items below it in order to protect defendant's belongings, and defendant could not assert a valid claim against the officers for failing to secure this property against loss, theft, or damage.[2] Rather than remove the plastic insert, the officers could merely have reported on the inventory sheet that the "cubby hole" was loose.[3] *Best*, 135 F.3d 1223, 1225 (where vehicle window would roll down only part way, officer shined his flashlight down into the window and, upon seeing a small package, pulled away the inside door panel and saw a bundle of marijuana, search did not fall within the permissible scope of

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[2] In *Best*, the Eighth Circuit relied on *Opperman* in determining that the officer's use of a flashlight to look into a door panel from the window molding "did not serve the purpose of 'protecting the car and its contents,'" one of the principal reasons for an inventory search. "Best would not have a legitimate claim for protection of property hidden in the door panel and therefore Trooper Byrd did not have a legitimate interest in seeking such property. Trooper Byrd could have simply indicated that the power windows did not work properly." 135 F.3d 1224-25.

[3] Accordingly, Trooper Byrd's continued search exceeds the permissible scope of an inventory search and constitutes an unreasonable search under the Fourth Amendment." [sic] 135 F.3d at 1225.

an inventory search because the defendant "would not have a legitimate claim for protection of property hidden in the door panel"). As in *Best*, removing the plastic cubby to search the rear fender area below it exceeded the permissible scope of an inventory search and excluded this search from this exception to the Fourth Amendment.

B. Search Incident to Arrest

The government also claims the area below the molded plastic insert was validly searched incident[4] to defendant's arrest, because it was within the passenger compartment of the vehicle. Filing 24, government's brief at p. 2. The defendant responds that the search cannot be justified as a search incident to arrest because the passenger compartment of the vehicle was not within his immediate control at the time of the search, and because a vehicle search conducted nearly an hour after an arrest is not "contemporaneous" with defendant's arrest. Filing 32 at pp. 7-8.

"When a police officer makes a lawful custodial arrest of an automobile's occupant, the Fourth Amendment allows the officer to search the vehicle passenger compartment as a contemporaneous incident of arrest." *United States v. Poggemiller*, 375 F.3d 686, 687 (8th Cir. 2004). A search incident to arrest is "justified by the reasonableness of searching for weapons, instruments of escape, and evidence of crime when a person is taken into official custody and lawfully

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[4] Black's Law Dictionary, Seventh Edition, 1999, defines "incident" as used here, thus: "Dependent upon, subordinate to, arising out of, or otherwise connected with (something else, usu. of greater importance) <the utility easement is incident to the ownership of the tract>."

Webster's Third New International Dictionary, Unabridged, defines "incident" as used here, thus: "Dependent on or appertaining to another thing; directly and immediately relating to or involved in something else though not an essential part of it."

detained." *Curd v. City Court of Judsonia, Arkansas*, 141 F.3d 839, 842 (8th Cir. 1998) (quoting *United States v. Edwards*, 415 U.S. 800, 802-03 (1974)). To be valid, a search incident to arrest "must be of objects within the arrestee's area of 'immediate control' and must be 'contemporaneous' with the arrest." *Id.* (citing *United States v. Morales*, 923 F.2d 621, 627 (8th Cir. 1991)).

In the context of defining the constitutional parameters of a search incident to arrest, the term "passenger compartment" has been interpreted broadly by most courts following the Supreme Court's decision in *New York v. Belton*, 453 U.S. 454 (1981), and generally includes any area within a vehicle occupant's reach. *United States v. Thompson*, 906 F.2d 1292, 1298 (8th Cir. 1990). Police searching a passenger compartment incident to arrest may examine the contents of any open or closed containers within the passenger compartment. A "container" is any object capable of holding another object, including "glove compartments, consoles, or other receptacles." *Poggemiller*, 375 F.3d at 688 (quoting *Belton*, 453 U.S. at 461 n.4). Under this expansive interpretation of a search incident to arrest, police who have arrested a vehicle driver may part the two rubber strips of the window seal with fingers and shine a penlight into the window well to perform a search, (*United States v. Barnes*, 374 F.3d 601 (8th Cir. 2004)[5]; open and search behind a factory-designed trap door area accessible only by lowering the rear seat arm rest (*Poggemiller*, 375 F.3d at 688); pull back the carpet in the rear seating area to investigate the contents of the secret compartment below, (*Lugo*, 170 F.3d at 1000); uncover and search a compartment built into the deck between the back seat and the rear window, (*United States v. Veras*, 51 F.3d 1365, 1368 (7th Cir 1995) (relied on by *Poggemiller*); and remove the radio from the dashboard to look for drugs inside

[5] Even though virtually the same conduct would not be permissible as part of an inventory search. *Best, supra*, [sic]

the radio. *United States v. Willis*, 37 F.3d 313, 317 (7th Cir. 1994).

Although access to the guns in the defendant's vehicle required removing the recessed molded plastic compartment insert within the passenger area, the officers gained access to this area without "elaborately dismantling" the vehicle. *Barnes*, 374 F.3d at 605 n.2. The molded plastic insert was removed without the aid of any tools. The rear fender area and vehicle suspension beneath that plastic insert was "reachable by an occupant without exiting the vehicle, and an occupant could conceal contraband, evidence, and certain weapons inside" this area. *Barnes*, 374 F.3d at 604. I therefore conclude the area beneath the rear seat "cubby hole" was within the vehicle's passenger compartment and defendant's "immediate control" at the time of his arrest, and the officers' search permissibly extended to this "container" as incident to defendant's arrest.

The defendant argues that once he was handcuffed and seated in the patrol vehicle, the passenger compartment was no longer within his immediate control. However, the area under a defendant's "immediate control" for the purposes of evaluating a search incident to arrest is examined as of the time the arrest, not the search. *Curd*, 141 F. 3d at 842 n. 9. *See also United States v. Wesley*, 293 F.3d 541, 547, 547-48 n.6 (D.C. Cir. 2002) and cases cited therein; 3 W. LaFave, Search and Seizure, § 5.3(a) at 111 (1996) (quoted at *Curd*, 141 F. 3d at 842 n.9). Therefore, the passenger compartment of a vehicle may be searched as incident to the defendant's arrest even after the defendant is no longer within the vehicle, and is handcuffed and in police custody. *See, e.g., Thornton v. United States*, 124 S.Ct. 2127, 2129 (2004) (search of vehicle compartment was incident to arrest where defendant exited the vehicle prior to arrest and was handcuffed and placed him [sic] in the back seat of the patrol car prior to the search); *Belton*, 453 U.S. at 454 (search of vehicle compartment was incident to arrest although

the four occupants had been removed from the vehicle); *Barnes*, 374 F.3d at 603-04 (search of vehicle compartment was incident to arrest where the defendant had been ordered out of the vehicle, handcuffed, and placed in the patrol car); *United States v McCrady*, 774 F.2d 868 (8th Cir. 1985) (search of locked glove box was incident to arrest notwithstanding that the vehicle driver had been removed from scene). *See also Wesley*, 293 F.3d 541 (D.C. Cir. 2002) (police "may search the passenger compartment of the vehicle without regard to whether the occupant was removed and secured at the time of the search"); *United States v. Humphrey*, 208 F.3d 1190 (10th Cir. 2000) (rejecting defendant's claim that *Belton* was inapplicable "once he had been taken into custody without resistance, handcuffed, and placed in the squad car"); *United States v. Mitchell*, 82 F.3d 146 (7th Cir. 1996) (*Belton* applicable even after defendant had been handcuffed and placed in the police vehicle); *United States v. Moorehead*, 57 F.3d 875 (9th Cir. 1995) (*Belton* applicable though defendant was secured in the back seat of the patrol car); *United States v. Mans*, 999 F.2d 966 (6th Cir. 1993) (search of passenger compartment was incident to arrest though defendant was seated in police cruiser under watch of another officer). Thus, the fact that defendant had been removed from the vehicle and was secured in the back of a cruiser does not take this search outside the scope of a search incident to arrest.

The defendant further argues that the vehicle search was not contemporaneous to his arrest and therefore was not justified as incident to his arrest. A search of a vehicle incident to the arrest of its driver must be conducted contemporaneous to the arrest. *United States v. Wells*, 347 F.3d 280, 287 (8th Cir. 2003). The justification for a rule allowing contemporaneous searches incident to a valid arrest—for example, to seize weapons or prevent the destruction of evidence of a crime—"are absent where a search is remote in time or place from the arrest." *Chimel v. California*, 395 U.S.

752, 764 (1969) (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)).

The search of the defendant's vehicle was not "remote in place" from the arrest—the defendant's vehicle was not moved from the location of the traffic stop before it was searched. *See, e.g.*, *Wells*, 347 F.3d 287 (where vehicle was driven to the police station and then an "inventory search" was conducted, the "search did not follow hard upon the heels of the arrest," and was not sanctioned as a search incident to a lawful arrest).

The defendant argues, however, that the search was not contemporaneous because one hour elapsed between the arrest and the search—that the search was "remote in time" —and, therefore, it was not a contemporaneous search incident to arrest. In analyzing the permissible parameters of a search incident to arrest, "searches of the *person and articles* '*immediately associated with the person of the arrestee,*' are measured with a . . . flexible constitutional time clock." *Curd*, 141 F.3d at 843 (emphasis added) (citing *United States v. Chadwick*, 433 U.S. 1, 15 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1982)). In contrast, "[t]he timeliness requirement for '*luggage or other personal property not immediately associated with the person of the arrestee*' is . . . constitutionally fairly strict." *Curd*, 141 F.3d at 843 (emphasis added) (citing *Chadwick*, 433 U.S. at 15 and *United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars ($639,558)*, 955 F.2d 712, 717 (D.C. Cir. 1992). In this case there is no argument that the pickup was "immediately associated with the person of the arrestee," so the stricter standard applies.

There is no fixed outer limit on the number of minutes that may pass between an arrest and a valid, warrantless vehicle search. *United States v. McLaughlin*, 170 F.3d 889, 892 (9th Cir. 1999). Although an indefinite delay is not permitted, officers may perform a search incident to an arrest if

the search is conducted at the scene of the arrest and any delay in the search is "reasonable" under the circumstances. *United States v. Nelson*, 102 F.3d 1344, 1347 (4th Cir. 1996).

> The requirement that the search and the arrest be roughly contemporaneous is not strictly temporal in nature. Rather, "the relevant distinction turns not upon the moment of arrest versus the moment of the search but upon whether the arrest and search are so separated in time or by intervening acts that the latter cannot be said to have been incident to the former."

United States v. Smith, 389 F.3d 944, 951 (9th Cir. 2004) (quoting *McLaughlin*, 170 F.3d at 893). *See also United States v. Abdul-Saboor*, 85 F.3d 664, 668 (D.C. Cir. 1996) (courts consider whether the arrest and search are separated in time or by intervening acts).

With respect to time, the issue of whether the search of defendant's vehicle followed "hard upon the heels" of the defendant's arrest, (*Wells*, 347 F.3d 287), [sic] requires determining if the search was part of a "continuous series of events closely connected in time," (*McLaughlin*, 170 F.3d at 893) [sic] and beginning with the defendant's arrest such that the nearly one-hour delay between the arrest and the search was reasonable. Although I consider this to be a close question, I conclude it was not.

The vehicle search did not occur within a few minutes of the defendant's arrest, as in the facts of most similar cases where the issue has been litigated. *See, e.g., United States v. Tank*, 200 F.3d 627, 631 (9th Cir. 2000) (arresting officer searched the car within minutes of the arrest); *McLaughlin*, 170 F.3d at 892-93 (vehicle search that began five minutes after defendant's arrest and removal from the scene was a search incident to arrest since the arrest, completion of impound paperwork, and initial search were part of one continuous

series of events closely connected in time); *United States v. Doward*, 41 F.3d 789, 793 n.3 (1st Cir. 1994) (officers initiated the vehicle search immediately after the defendant was arrested and completed it within thirty seconds after he was transported from the scene); *United States v. Johnson*, 846 F.2d 279, 283 (5th Cir. 1988) (briefcase searched "[a]lmost immediately following the arrest"). In contrast, this search began approximately an hour later.

Accepting that the "temporal proximity" should not alone dictate, but rather whether there was a "continuous flow" stemming from the arrest, the circumstances here become blurrier. After his arrest defendant requested to speak with a drug investigator, and thus, the delay occasioned by that request might reasonably be "charged" against the defendant, not the officers. That was the government's argument during closing statements at the hearing, but it was unsupported by case authority. I have likewise been unable to find any case in which the issue of who caused the delay made any difference in deciding the issue of "contemporaneousness." During the delay the defendant spoke with an investigator concerning three subjects: (1) Whether he would consent to the search of his vehicle; (2) His suggestion to the investigator that perhaps he could provide information to law enforcement about drug-related crime in the area; and (3) His request that if he did so cooperate, whether he might be released.

While these topics were obviously of interest to both the officers and the defendant, they were unrelated to his arrest for driving on a suspended license. As conceded by Investigator Enlow, defendant was essentially bargaining for his release. However, even if his bargaining for release had been successful, that would not have eliminated the need to search the vehicle; the vehicle had to be impounded, because there

was no eligible person present to drive it. The tow truck had already been called.[6]

The evidence before me gives rise to the inference that the officers were more interested in whether defendant could be arrested for drug trafficking than they were in completing the arrest for the instant offense. Investigator Enlow had been given an anonymous tip that the defendant and his brother might be involved in methamphetamine possession or distribution. The defendant requested to speak with a drug investigator. The defendant would not consent to the search of his vehicle. While these facts may be sufficient to create a reasonable suspicion, they were far short of the standard for finding probable cause to believe that the vehicle contained contraband, the necessary threshold for conducting a warrantless vehicle search.[7]

Under such circumstances, I conclude that the delay between the defendant's arrest and the vehicle search cannot be explained or condoned as caused by procedural steps related to this defendant's arrest. The delay was unreasonable. The search was not performed within the "fairly strict" constitutional time clock applicable to vehicle searches, and cannot be considered a contemporaneous incident of the arrest. *Curd*, 141 F.3d at 843 (relying on *Chadwick*, 433 U.S. at 15,

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[6] These facts do not activate the "inevitable discovery rule," because although such impoundment would inevitably include an inventory search, as established above, searching below this cubby hole was not within the permissible limits of an inventory search.

[7] "Law enforcement officials may search a vehicle without a warrant so long as they have probable cause. *United States v. Fladten*, 230 F.3d 1032, 1085 (8th Cir. 2000) (per curiam). Probable cause 'exists when, given the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place.' Id." *U.S. v. Ameling*, 328 F.3d 443, 448 (8th Cir. 2003), *cert. denied*, 540 U.S. 961 (2003).

search at police station conducted more than an hour after gaining exclusive control of defendant's footlocker and his arrest cannot be viewed as incidental to the arrest), and *Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars ($639,558)*, 955 F.2d at 717 (search was not a contemporaneous incident of arrest where thirty minutes lapsed between arrest and handcuffing of the defendant and the officer's search of his luggage). *See also United States v. Vasey*, 834 F.2d 782, 788 (9th Cir. 1987) (where defendant had been arrested on an outstanding warrant and was handcuffed and placed in a police vehicle, had refused to consent to a vehicle search, and was then questioned concerning drug-related activity, "inventory search" of vehicle which began thirty to forty-five minutes post-arrest was not a contemporaneous search incident to arrest).

For the reasons discussed above, I conclude that the motion to suppress should be granted.

IT THEREFORE HEREBY IS RECOMMENDED to the Honorable Richard G. Kopf, United States District Judge, pursuant to 28 U.S.C. § 636(b)(1)(B), that the defendant's motion to suppress, filing 18, be granted.

The parties are notified that a failure to object to this recommendation in accordance with the local rules of practice may be held to be a waiver of any right to appeal the district judge's adoption of this recommendation.

FURTHER, IT HEREBY IS ORDERED, Trial of this matter is set to commence at 9:00 a.m. on April 25, 2005, before the Hon. Richard G. Kopf, United States District Judge. Trial is scheduled for a duration of three trial days.

DATED this 10th day of February, 2005.

BY THE COURT:
s/ David L. Piester
David L. Piester
United States Magistrate Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-2111

United States of America,	*	
	*	
Appellant,	*	
	*	Order Denying Petition
v.	*	for Rehearing and for
	*	Rehearing En Banc
Zachary Hrasky,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Wollman, Judge Arnold and Judge Bye would grant the petition for rehearing en banc.

(5128-010199)

September 13, 2006

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
MAR 19 2007
OFFICE OF THE CLERK

(2)

No. 06-827

In the Supreme Court of the United States

ZACHARY HRASKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the discovery of two firearms in petitioner's vehicle resulted from an invalid search incident to arrest under *New York* v. *Belton*, 453 U.S. 454 (1981), because of petitioner's distance from his vehicle at the time of arrest.

2. Whether this Court should overrule its decision in *Belton* or limit it by precluding the search of a car incident to an arrest for a traffic violation.

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In the Supreme Court of the United States

No. 06-827

ZACHARY HRASKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 453 F.3d 1099. The memorandum and order of the district court (Pet. App. 17a-18a) and the report and recommendation of the Magistrate Judge (Pet. App. 19a-34a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2006. A petition for rehearing was denied on September 13, 2006 (Pet. App. 35a). The petition for a writ of certiorari was filed on December 12, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 2, 2004, Nebraska state police received a tip from an informant that petitioner might be driving a specific green Chevrolet pick-up truck without a valid driver's license. Pet. App. 20a. The informant also indicated that petitioner might be involved in the distribution of methamphetamine. *Ibid.* Based on that tip, State Trooper Jeff Wallace stopped petitioner as he was driving the truck in question in Scotts Bluff County, Nebraska. *Id.* at 2a, 20a-21a. Trooper Wallace determined that petitioner was driving with a suspended license and that he had two prior offenses for driving with a suspended license. *Id.* at 2a, 21a. Because of those two prior offenses, Trooper Wallace told petitioner that he would not be released with only a citation. *Ibid.* Rather, Trooper Wallace handcuffed petitioner and placed him in the back of the patrol car. *Ibid.*

When petitioner learned that he would not be released with a citation, he asked to speak to a narcotics investigator about his knowledge of drug crimes in the area. Pet. App. 2a. Trooper Wallace agreed and summoned Investigator Cody Enlow, a narcotics officer, to the scene. *Ibid.* Investigator Enlow talked to petitioner for approximately 45 minutes about becoming a confidential informant, but ultimately concluded that petitioner was unwilling or unable to commit to assisting law enforcement. *Id.* at 2a, 6a. Trooper Wallace then conducted a search of petitioner's truck incident to the arrest. *Id.* at 2a-3a. In a cubby hole of the truck's passenger area, the officers discovered two loaded handguns. *Id.* at 3a, 23a. Following that search, petitioner was taken to jail, and the truck was towed away. *Id.* at 3a.

2. On October 20, 2004, a federal grand jury indicted petitioner on one count of being a convicted felon in possession of firearms, in violation of 18 U.S.C. 922(g)(1). Gov't C.A. Br. 1. Petitioner moved to suppress the evidence seized from his truck. Pet. App. 1a.

A Magistrate Judge recommended that petitioner's motion be granted. Pet. App. 19a-34a. After rejecting the government's argument that the firearms were seized during a valid inventory search of petitioner's truck, *id.* at 23a-25a, the Magistrate Judge addressed whether the warrantless search of the truck was a valid search incident to petitioner's arrest under *New York* v. *Belton*, 453 U.S. 454 (1981), Pet. App. 25a-33a. The Magistrate Judge determined that "the area beneath the rear seat 'cubby hole' was within the vehicle's passenger compartment and [petitioner]'s 'immediate control' at the time of his arrest, and the officers' search permissibly extended to this 'container' as incident to [petitioner]'s arrest." *Id.* at 27a. Citing *Thornton* v. *United States*, 541 U.S. 615 (2004), the Magistrate Judge added that "the passenger compartment of a vehicle may be searched as an incident to the defendant's arrest even after the defendant is no longer within the vehicle, and is handcuffed and in police custody." Pet. App. 27a. Consequently, the Magistrate Judge reasoned, "the fact that [petitioner] had been removed from the vehicle and was secured in the back of a cruiser does not take this search outside the scope of a search incident to arrest." *Id.* at 28a.

Petitioner further argued "that the vehicle search was not contemporaneous to his arrest and therefore was not justified as incident to his arrest." Pet. App. 28a. The Magistrate Judge found that the search of petitioner's truck was not "remote in place" from the site of

petitioner's arrest. *Id.* at 29a. But, while calling it a "close question," the Magistrate Judge found that the search of petitioner's truck was "remote in time" from his arrest. *Id.* at 29a-33a. In that regard, the Magistrate Judge determined that "[t]he vehicle search did not occur within a few minutes of [petitioner]'s arrest." *Id.* at 30a. The Magistrate Judge found the facts to be "blurr[y]" because petitioner prompted delay by asking to speak with officers about becoming a confidential informant. *Id.* at 31a. The Magistrate Judge also acknowledged that he had found no comparable cases in which the temporal delay between arrest and search "might reasonably be 'charged against the defendant,'" and that he was likewise "unable to find any case in which the issue of who caused the delay made any difference in deciding the issue of 'contemporaneousness.'" *Ibid.* (citation omitted). Nonetheless, the Magistrate Judge found the delay unreasonable. *Id.* at 32a.

In a short Memorandum and Order dated April 4, 2005, the district court adopted the Report and Recommendation of the Magistrate Judge. Pet. App. 17a-18a.

3. On interlocutory appeal, the court of appeals reversed. Pet. App. 1a-16a. The court found it "significant that during the sixty minutes that [petitioner] was in the patrol car, the officers were unsure whether he would be transported to the police station for booking, or released at the scene with only a citation." *Id.* at 6a. The court explained that "[i]t was only after [petitioner] was deemed unable or unwilling to assist law enforcement that the trooper determined to make a 'full custodial arrest' in the sense that underlies the doctrine of searches incident to arrest." *Id.* at 6a-7a (citation omitted). In contrast to the district court's determination that the search was temporally remote from the arrest, the court

of appeals believed that "[t]he search of [petitioner]'s truck certainly was contemporaneous with this decision to proceed with a full custodial arrest." *Id.* at 7a. Noting that this case presents "an unusual situation in which the arrestee initiated discussions with officers in an effort to persuade them to issue a citation in lieu of carrying out a full custodial arrest," the court added that once "the officers determined to make a full custodial arrest, the search of [petitioner]'s vehicle was conducted immediately." *Id.* at 8a.

Judge Gibson dissented. Pet. App. 9a-16a. Because he concluded that the "warrantless search of [petitioner]'s truck * * * occurred more than one hour after [petitioner]'s arrest for driving with a suspended license," Judge Gibson thought that the search was unconstitutional. *Id.* at 9a. Noting his disagreement with the majority about when the relevant arrest occurred, Judge Gibson asserted that petitioner "was subject to a lawful custodial arrest for driving while suspended at the point when he was handcuffed and placed in the patrol car," and that the search of his truck "more than one hour later" was not "a contemporaneous incident of that arrest." *Id.* at 11a (quoting *Belton*, 453 U.S. at 460). At the same time, Judge Gibson acknowledged that the search did "not run afoul of the geographical" or spatial limitation to searches incident to arrest, because the search was conducted at the scene of the arrest. *Id.* at 12a. "However," Judge Gibson reiterated, "the greater than one-hour delay here between the arrest and the search does run afoul of the temporal limitation." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-7) that this Court should grant a writ of certiorari to address (1) whether a search under *New York* v. *Belton*, 453 U.S. 454 (1981), may take place when the occupant of the vehicle is arrested beyond "reaching distance" of the vehicle, and (2) whether *Belton* should be reconsidered. Further review is not warranted, particularly in the context of this interlocutory decision of the court of appeals remanding the case for further proceedings.

1. This Court typically awaits final judgment before exercising certiorari jurisdiction. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari). Lack of finality "alone [is] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916).

Indeed, this Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the end of criminal proceedings if a defendant's conviction and sentence ultimately are affirmed on appeal. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). That approach promotes judicial efficiency because the issue that petitioner raises, concerning the admissibility of evidence, may be rendered moot by further proceedings concerning petitioner's guilt or innocence on remand. If the suppression issue remains live following further proceedings on remand, petitioner

could raise that issue, along with any other issues, in a single petition following entry of final judgment. See *Hamilton-Brown Shoe*, 240 U.S. at 258.

2. Petitioner argues (Pet. 8-14) that the search of his vehicle was not a valid search incident to arrest under *Belton*. Petitioner does not, however, raise the issue on which the district court suppressed the fruits of the search of his truck, and on which Judge Gibson would have ruled in his favor—whether there was sufficient *temporal* proximity between petitioner's custodial arrest and the search of his truck to satisfy *Belton*. Rather, petitioner contends (Pet. 8-14) that there was insufficient *spatial* proximity between him and his vehicle.

a. That contention is not well presented in this case. In the court of appeals, petitioner argued only that the search was not temporally proximate to his arrest; not, as he now argues, that he was not arrested within reaching distance of his vehicle. See Pet. C.A. Br. 6-24. While the court of appeals' decision contains some background statements of law culled from other decisions, see Pet. App. 3a-5a, it focuses on the temporal question raised by petitioner in that court, see *id.* at 5a-9a, not the reaching-distance question on which petitioner now relies.

b. In any event, petitioner's contention lacks merit. It is well established that when police make an arrest, they may search the arrestee's person and the area "within his immediate control" without obtaining a warrant. *Chimel* v. *California*, 395 U.S. 752, 762-763 (1969). That rule is justified by the need "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and the need to prevent the "concealment or destruction" of evidence. *Id.* at 763. Accord *Thornton* v. *United States*, 541 U.S. 615, 620 (2004); *Knowles* v. *Iowa*, 525 U.S. 113, 116-117 (1998).

In *United States* v. *Robinson*, 414 U.S. 218, 235 (1973), this Court held that a search incident to arrest is per se reasonable, and accordingly permissible under the Fourth Amendment, regardless of whether the circumstances of the particular case involve one of the twin rationales for such a search, *i.e.*, a threat to officer safety or a risk of evidence destruction. The Court explained that the authority to search incident to arrest "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found." *Ibid.* The Court reasoned that "[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for the arrest." *Id.* at 234 n.5.

In *Belton*, the Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460 (footnote omitted). Reaffirming its holding in *Robinson* that a search incident to a custodial arrest is permissible even if the officer is not searching for weapons or attempting to prevent the destruction of evidence, the Court explained that, in this "particular and problematic context," a bright-line rule is "essential" to provide "[a] single, familiar standard * * * to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* at 458, 460 n.3, 461 (quoting *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979)).

Recently, in *Thornton*, the Court held that "*Belton* governs even when an officer does not make contact until the person arrested has left the vehicle." 541 U.S. at

617. "In all relevant respects," the Court explained, "the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and destruction of evidence as the arrest of one who is inside the vehicle." *Id.* at 621. Thus, the Court upheld the search of a vehicle where the police first made contact with an individual after he had left his vehicle, and where the police conducted the search when the defendant was handcuffed in the back seat of a patrol car. See *id.* at 618.

Under those precedents, petitioner's contentions lack merit. The police first made contact with petitioner when he was not only within reaching distance of his car, but was actually in his car, which is more than *Thornton* requires. See Pet. App. 2a. And the police arrested petitioner at the scene, and searched his vehicle while he was handcuffed in a police car, just as in *Thornton*. See *id.* at 2a-3a.

The disagreement among the lower court judges in this case concerned the *temporal* proximity between the arrest and search, and turned in large part on when petitioner was subject to a custodial arrest. See Pet. App. 7a, 11a. Petitioner does not raise that issue here, and for good reason: it is too factbound to warrant this Court's review, especially considering the "unusual" facts of this case, where petitioner sought to forestall a custodial arrest, and was thus responsible for any delay. *Id.* at 8a.

c. Petitioner erroneously alleges (Pet. 9-12) that "[t]here is a deep division among the federal and state courts as to whether the Fourth Amendment permits officers to search an arrestee's vehicle when he is arrested beyond reaching distance from it." Pet. 9. Significantly, the cases cited by petitioner are all cases in

which arresting officers first encountered defendants some distance away from their vehicles—not cases, like this one and *Belton*, where an officer first confronted a defendant when he was in a vehicle, and then ordered him out of the vehicle before making the arrest and conducting the search. In addition, all of the federal court of appeals and state supreme court cases relied on by petitioner as the basis for the circuit split predate *Thornton*.

Petitioner's contention (Pet. 9) that the Seventh Circuit acknowledged a circuit split in *United States* v. *Pittman*, 411 F.3d 813 (2005), only underscores those points. In *Pittman*, the police first made contact with the car's former passenger in the basement of a house half a block from the car, and all of the cases cited for the asserted disagreement concerning the application of *Belton* in that distinguishable circumstance predate *Thornton*. See *id.* at 815.

For example, in *United States* v. *Edwards*, 242 F.3d 928 (10th Cir. 2001), police who arrived in response to a bank's silent alarm found the defendant "standing outside the bank with a parking lot attendant." *Id.* at 931. Subsequently, the police located a car that the defendant's girlfriend had rented (*id.* at 931-932), approximately "100-150 feet away" from the place where they had encountered and arrested the defendant. *Id.* at 938. The Tenth Circuit held that the search of that rental car was not a valid search incident to the defendant's arrest, because "there is no evidence whatsoever that Edwards had any control over the rental car immediately preceding or at the time of his arrest." *Ibid.* Nothing in *Edwards* suggests that the police would not have been permitted to search the car incident to an arrest had the

police first encountered the defendant in the car and subsequently removed him from the vehicle.[1]

Similarly, in *United States* v. *Strahan*, 984 F.2d 155 (6th Cir. 1993) (cited at Pet. 10), the defendant was "apprehended * * * outside the doorway of [a] lounge, approximately thirty feet from defendant's automobile." *Id.* at 156-157. Although the Sixth Circuit invalidated the search, it explained that "*Belton* governs when the arrestee is removed from the car prior to the time of the search." *Id.* at 159. The Sixth Circuit correctly noted that in *Belton* itself, "the officer removed the defendant from his vehicle prior to making the search of the vehicle." *Id.* at 159 n.5. Indeed, the defendant in *Belton* was removed from the car before his arrest, as well. See *Belton*, 453 U.S. at 456 (trooper "directed the men to get out of the car, and placed them under arrest"). Because the officer in this case first encountered petitioner when he was inside his vehicle, cases like *Strahan* are inapposite. Cf. *United States* v. *Fafowora*, 865 F.2d 360, 362 (D.C. Cir.) (the police "c[a]me upon the arrestees outside of an automobile"), certified question dismissed, 489 U.S. 1002 (1989).

Moreover, as this Court recently held in *Thornton*, "*Belton* governs even when an officer does not make contact until the person has left the vehicle." *Thornton*, 541 U.S. at 617. Thus, the statement in *Strahan* that *Belton* and similar cases "appl[y] only where the police initiate contact while the defendant is within his automobile, but subsequently remove the arrestee" (*Strahan*,

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[1] Far from disagreeing with the decision below, the Tenth Circuit recently cited that decision with approval in a search-incident-to-arrest case involving temporal proximity. *United States* v. *Torres-Castro*, 470 F.3d 992 (2006).

984 F.2d at 159), is contrary to this Court's subsequent decision in *Thornton*.

3. Petitioner further contends (Pet. 14-26) that this Court should overrule or limit *Belton*, perhaps by exempting custodial arrests for traffic violations from its scope, or by confining it to searches in which an officer reasonably believes that a motor vehicle contains evidence of the crime of arrest. See Pet. 23. Petitioner's claim lacks merit.

a. There is no support for limiting *Belton* based on the nature of an arrestee's criminal offense. This Court has long recognized that "[t]he danger to the police officer flows *from the fact of the arrest*, and its attendant proximity, stress, and uncertainty, and *not from the grounds for arrest*." *Robinson*, 414 U.S. at 234 n.5 (emphases added); accord *Thornton*, 541 U.S. at 621. Thus, concerns for officer safety as well as preservation of evidence are generally present regardless of the nature of the crime of arrest. In *Robinson*, for instance, the Court upheld a search of an arrestee's person incident to an arrest for driving with a revoked operator's permit. 414 U.S. at 220-221, 223, 234-235. Similarly, in this case, a threat to officer safety was presented by the loaded firearms that petitioner carried in his truck, even though he was arrested for driving without a valid permit.[2]

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[2] Contrary to petitioner's suggestion (Pet. 25), there is no "disconnect between the *Belton* doctrine and this Court's decision in *Knowles* [v. *Iowa*, 525 U.S. 113 (1998)]." Rather, *Knowles* held that the Fourth Amendment does not permit a search incident to a traffic stop in which a citation is issued but no custodial arrest occurs. *Id.* at 118-119. The Court explained that traffic citations do not present the same concerns for officer safety and the destruction of evidence that are generally, but not always, present in custodial arrests. *Ibid.* The Court in *Knowles*

Belton and *Thornton* establish a bright-line rule in order to provide workable standards in highly volatile and potentially dangerous situations involving custodial arrests of occupants and recent occupants of motor vehicles. That goal would be undermined by any requirement that "there must be litigated in each case" the question whether the circumstances of the particular custodial arrest implicated one of the underlying purposes of the search-incident-to-arrest doctrine. *Thornton*, 541 U.S. at 620 (quoting *Robinson*, 414 U.S. at 235). Similarly, it would undermine the purposes of *Belton* if officers were required to make snap decisions about whether vehicles were reasonably likely to contain evidence of specific crimes of arrest (as opposed to evidence of other crimes or weapons that might be used to injure the officers or to effectuate an escape).[3]

Petitioner mistakenly claims (Pet. 20-22) that the bright-line rule of *Belton* is unworkable. Even if there are still some close cases, *Belton* has effectively resolved

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also recognized that officers are entitled to "conduct a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest." *Id.* at 118.

[3] It would also make little sense to limit "*Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Pet. 23 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment)). If it is "reasonable to believe" that a car contains evidence of a crime, a search of the car is permissible for that evidence under the automobile exception to the warrant requirement. See, *e.g.*, *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003) (search is permitted upon probable cause—a "reasonable ground for belief"—that the car may contain evidence of a crime) (quoting *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949)). The proposed rule would thus appear to be subsumed within the existing justifications for a search, and, if so, would serve no independent purpose (except, perhaps, as a source of confusion).

the vast majority of cases, and as discussed above, alternative approaches present their own problems. This case hardly shows any difficulty with the *Belton* framework, because the officer first confronted petitioner in his car and never removed petitioner from the scene until after the search, and petitioner has abandoned the temporal proximity argument on which he relied in the court of appeals.

Contrary to petitioner's suggestion (Pet. 14), not even the dissenting opinion in *Thornton* supports petitioner's proposals to limit *Belton* to searches for evidence related to the crime of arrest (Pet. 23) and to eliminate *Belton* searches incident to custodial traffic arrests (Pet. 25). Justice Stevens dissented in *Thornton* on the ground that "[t]he bright-line rule crafted in *Belton* is not needed for cases"—unlike this one—"in which the arrestee is first accosted when he is a pedestrian." 541 U.S. at 636. That dissent nowhere suggests that *Belton* should apply only when the search is relevant to the crime for which the defendant was arrested. Rather, it makes clear that, when the police first accost an individual in an automobile, *Belton* establishes an appropriate bright-line rule for searches incident to custodial arrest. See *id.* at 634, 635-636.

b. Since *Thornton* was decided, this Court has on at least two occasions denied petitions seeking to revisit *Belton*. See *United States* v. *Osife*, 398 F.3d 1143 (9th Cir.), cert. denied, 126 S. Ct. 417 (2005); *Rainey* v. *Commonwealth*, 197 S.W.3d 89 (Ky. 2006), cert. denied, 127 S. Ct. 1005 (2007). There is no reason for a different result here. Contrary to petitioner's suggestion (Pet. 24 n.6), this case does not present a better vehicle than *Rainey* to revisit *Belton*. Petitioner asserts (Pet. 24) that the officers in this case could not have found evi-

dence of the crime for which petitioner was arrested, driving with a suspended license. Yet the officers could well have found a suspended license, or even a facially valid but counterfeit license. Moreover, when an officer conducting a *Belton* search finds loaded firearms in the vehicle, as in this case, the officer safety concern of *Belton* and *Robinson* is clearly implicated, even if the preservation of evidence rationale is not.

In any event, this case is a poor vehicle for revisiting the bright-line rule of *Belton* in light of its "unusual" facts. Pet. App. 8a. As discussed, any delay in the search incident to arrest "might reasonably be 'charged' against the defendant" (*id.* at 31a), and there is considerable confusion as to when petitioner was arrested (compare, *e.g.*, *id.* at 2a (Trooper "Wallace informed [petitioner] that he would not be released with a citation"), with *id.* at 6a ("the officers were unsure whether he would be * * * released at the scene with only a citation")).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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